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No. _____

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

BURKE, WILLIAMS & SORENSEN
J. ROBERT FLANDRICK,* CITY ATTORNEY, CITY OF WHITTIER
KATHERINE E. STONE
BENJAMIN S. KAUFMAN
LISA E. KRANITZ
One Wilshire Building, 11th Floor
624 South Grand Avenue
Los Angeles, California 90017
Telephone: (213) 623-1900
Counsel for Appellants
*Counsel of Record

Westside Law Publishers Los Angeles, California (213) 477-0491

QUESTIONS PRESENTED

By an unpublished Memorandum, a panel of the Ninth Circuit Court of Appeals held unconstitutional Whittier's adult business zoning regulations which had previously been held facially valid in a prior state action between the same parties. *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983) (App. F, 45a). The questions presented are:

1. Are the federal courts required to respect state court processes and give preclusive effect or abstain from the exercise of jurisdiction where a state action is filed two years before a federal case involving the identical issues and parties, and the state appellate court's published opinion is final before the federal district court enters its judgment?

2. Where a city adopts an adult business zoning ordinance after seven months of study, which includes several public hearings at which evidence is presented showing that increased crime rates and decreased property values resulted from the concentration of thirteen adult businesses in the city, where other sites are available for such businesses, and where there is no evidence of improper motivation on the part of any legislator; is such an ordinance properly invalidated because three years later, in a deposition, a city official, not a member of the legislative body, states that in his opinion churches are morally opposed to "the display of the human body?"

PARTIES TO THE PROCEEDINGS

In addition to the City of Whittier, California, a Charter City, the following are also Appellants in this Court: M.D. Klaxton, R.L. Henderson (Mr. Henderson is no longer a member of the Whittier City Council; Councilmember Sabina Schwab replaced Mr. Henderson at the 1984 election), L.A. Strong, Gene Chandler, and V.A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and J. Robert Flandrick, as City Attorney of the City of Whittier.

Walnut Properties, Inc., a California corporation, is Appellee before this Court.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The unpublished Amended Memorandum of the United States Court of Appeals for the Ninth Circuit, from which this appeal is taken, was filed September 30, 1985, and appears as Appendix A. Other orders and opinions of the court of appeals and district court appear as Appendices B through E.

JURISDICTION

In this action Appellee Walnut Properties, Inc. ("Walnut"), sought injunctive and declaratory relief under 42 U.S.C. section 1983 against enforcement of Whittier's adult business Regulations which were modeled after the regulation approved by this Court in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). Federal jurisdiction was based on 28 U.S.C. section 1343 subdivisions (3) and (4). The district court's judgment held the Regulations "valid and subsisting" except that portion which prohibits the location of an adult business within 1,000 feet of a church which it declared invalid on the ground that there was insufficient evidence before the City Council to support the separation at the time of the public hearings on its enactment. The notice of appeal of Appellants City of Whittier, *et al.* ("Whittier"), was filed March 26, 1984.

The Ninth Circuit panel filed its first unpublished Memorandum on May 14, 1985. On September 30, 1985, the panel denied Whittier's petition for rehearing and filed the Amended Memorandum.

Whittier's notice of appeal was filed in the Ninth Circuit on November 20, 1985. App. K, 87a. Jurisdiction lies in this Court under 28 U.S.C. section 1254(2). *New Orleans v. Duke*, 427 U.S. 297, 301 (1976); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927 n.2 (1975).

Neither court below certified to the California Attorney General the fact that the constitutionality of the Regulations was drawn into question and that 28 U.S.C. section 2403(b) may be applicable. Pursuant to Rule 28.4(c) of this Court, Appellants have served three copies of this Jurisdictional Statement upon the Attorney General of the State of California.

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title 28, Section 1738 of the United States Code provides in pertinent part:

> [R]ecords and judicial proceedings [of any State, Territory or Possession] shall have the same full faith and credit in every court in the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

The full text of Whittier's Ordinances Nos. 2327, 2257, 2254, 2138, 2121 and 2116 (collectively "Regulations") are set forth as Appendices L through Q, respectively.

STATEMENT OF THE CASE

The Ninth Circuit in this case, as in *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360, held that:

(1) Whittier could not rely on the experiences of other cities to justify its adoption of the Regulations;

(2) No sites were available in Whittier for an adult business to locate by *assuming* that (a) a shopping center owner would not lease to an adult theater; and (b) areas zoned industrial (where commercial *and* industrial uses are expressly permitted and are located) were not constitutionally adequate sites; and

(3) Without any other evidence of an improper motive by any legislator, a motive to suppress protected expression sufficient to invalidate the Regulations could be inferred from a subsequent statement of a city employee.

If this Court reverses the decision of the Ninth Circuit in *Renton,* it should do so in this case for the same reasons.

Unlike the situation in *Renton,* the state courts here had jurisdiction over the parties and the subject matter long before this case was filed in the district court. Two opinions had been issued by the state court of appeal upholding the Regulations before judgment was entered in the district court. App. F, 45a; App. H, 67a.

The unpublished Amended Memorandum is in direct conflict with the published opinion of the California Court of Appeal (App. F, 45a) and is, as a result, causing great mischief. All persons are entitled to rely on the published opinions of state appellate courts for guidance in the conduct of their affairs. In this case, a trap for the unwary exists: the comment to West's California Code Forms, under the heading, "An Ordinance Regulating Adult Businesses" states, "This form is based on an ordinance by the City of Whittier which was upheld in *City of Whittier v. Walnut Properties, Inc.,* 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983)." West's California Code Forms, Government, § 37101 - Form 15, p. 227 (2d ed. 1985).

Whittier, like the City of Renton, is a small city (70,000 population) located immediately adjacent to a large metropolitan area (Los Angeles). By 1977, Whittier had experienced a rapid growth of adult businesses. There were thirteen adult businesses, including bookstores, a theater, massage parlors and model studios, in the City

and two more in adjacent unincorporated areas. App. R, 119a. In 1977, Whittier adopted an urgency ordinance (No. 2116, App. Q, 113a) to maintain the status quo so that the problems associated with this rapid growth could be studied. During a seven month study, several public hearings were held, surveys made and the experience of many other similarly situated cities studied. Whittier's study showed, among other things, depreciation in property values and an increase in crime in the area in which adult businesses were located, including prostitution, assault and battery, theft, arson, and sexual offenses, and an influx of drunk drivers and intoxicated persons (the staff report documented a 102% increase in crime in the area where adult businesses were as compared with an 8.3% increase city-wide). App. R, 125a-26a. At the various public hearings, citizens testified of being afraid to walk the streets in these areas, that some businesses had left these areas, and that they were fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material. App. R, 126a. There was also evidence of increased traffic and litter, the latter resulting in sexually explicit materials being abandoned and thus made accessible to children. App. R, 126a-27a.

In February 1978, Whittier adopted a zoning ordinance (No. 2138, App. O, 101a) based on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), which permitted defined adult businesses in commercial or industrial zones, with a separation requirement of 500 feet from residences and 1,000 feet from schools, churches, parks or other public facilities utilized by minors, and other adult businesses. The ordinance validated existing adult businesses as legal nonconforming uses subject to abatement only after an amortization period reflecting their economic life.

Walnut owns and operates, as a part of its Pussycat Theater chain, the Wardman Theatre ("Theater") in the Whittier Village Area of the City. The Theater is within 1,000 feet of four churches, two of which operate full-time parochial elementary schools.

After expiration of the economic-life amortization period applicable to the Theater under the ordinance, the City issued an order of abatement. Similar orders were also issued to other adult businesses which had lost the status of a legal nonconforming use under the Regulations. Walnut appealed the order first to the Planning Commission, then to the City Council, each of which conducted a *de novo* public hearing. Walnut presented no evidence at either hearing, but made only legal arguments.

On April 30, 1979 (two years before this federal action was filed), the City filed an action in the California Superior Court to enforce the abatement order by injunction. The trial court held Ordinance No. 2138 unconstitutional because it construed the provision requiring a 1,000 foot separation of adult businesses from any "public facility which is utilized by minors," as banning all adult businesses. App. J, 85a. Prior to entry of judgment Whittier amended the ordinance to remedy the perceived defect (the amending ordinances, No. 2254, App. M, 93a, an urgency ordinance, and No. 2257, App. N, 97a, are identical; No. 2257 is the subsequent permanent version of No. 2254).

In February 1983, the state court of appeal issued its first opinion (App. H, 67a) holding the Regulations valid as amended. This opinion thoroughly analyzed the Regulations both facially and as applied to Walnut. The Regulations were subjected to "close scrutiny" and found valid. On May 19, 1983, the California Supreme Court

granted Walnut's petition for hearing and retransferred the matter to the court of appeal with directions to reconsider its opinion as to two factual issues: (1) was the Theater an adult business within the meaning of the Regulations, and (2) the availability of alternate sites. *See* App. G, 66a; App. F, 52a-54a.

On December 8, 1983, the court of appeal, after additional oral argument, issued its second published opinion (App. F, 45a), again upholding the Regulations and remanding the matter to the trial court for findings on the two limited issues referred to in the California Supreme Court's order. Walnut's petition for rehearing to the court of appeal was denied on January 4, 1984, and its petition for hearing to the California Supreme Court was denied on February 2, 1984. Walnut did not petition this Court for review.

This federal case was filed on May 7, 1981, after the trial court's judgment in the state proceeding where Walnut had raised and litigated all its constitutional claims. Whittier moved the district court to abstain from exercise of jurisidiction. Before the hearing on Whittier's motion, the district court ordered the proceedings stayed upon stipulation of the parties.

After the first opinion by the California court of appeal was published, the district court, on its own motion, ordered the parties to appear at a series of status conferences and thereafter, notwithstanding the status of the state litigation, ordered the case to trial. Judgment was not entered by the district court until March 9, 1984, well after the California court of appeal's second opinion (App. F, 45a) had become final. The district court's judgment held the Regulations to be,

> valid and subsisting, having been properly and lawfully adopted by the . . . City Council . . .

> [except] that portion . . . which prohibits the location of an adult business within 1,000 feet of a church . . . [which] is declared invalid on the ground that at the time of the public hearing preceding the enactment of the . . . ordinances, there was insufficient evidence presented to the City Council to support its conclusion that this portion of the regulation was reasonably required to protect the public health, safety and general welfare. App. D, 31a-32a.

The Reporter's Transcript ("RT") makes clear that the district court only intended to rule that the 1,000 foot separation was "facially invalid," (RT, at 257) and severed that portion from the remainder of the Regulations which it held valid. *Id.* at 259. The court's judgment enjoined Whittier from enforcing the provision held invalid. App. D, 32a.

After the district court announced its intended decision, Whittier held public hearings at which additional evidence was presented supporting the 1,000 foot separation from a church. Whittier, based upon additional evidence, then readopted that provision as Ordinance No. 2327 (App. L, 89a), and requested the Ninth Circuit take judicial notice of the legislative action.

The panel's first unpublished Memorandum voided all the Regulations because it stated that they "violate" the First Amendment in that they were not shown to justify legitimate government needs, because they restrict protected speech and because one of the City's reasons for enacting the Regulations was to suppress protected speech. App. C, 18a. Whittier filed a timely petition for rehearing. On September 30, 1985, the panel denied the petition for rehearing, rejected Whittier's suggestion for en banc rehearing and filed its Amended Memo-

randum. Contrary to Rule 3(c) of the Federal Rules of Appellate Procedure, the panel decided there were "three factual issues on appeal."[1]

The panel dismissed six years of litigation in the California courts, holding that the state courts had not decided: (1) whether the Regulations were improperly motivated, (2) whether the Regulations furthered an important or substantial governmental interest, and (3) whether alternative sites existed for the Theater to relocate. App. A, 4a. The panel then went on to hold that: (1) a motivating factor of the Regulations was to suppress protected speech, based on a statement made at deposition by Elvin Porter, Whittier's planning director, read into the record by Walnut's attorney on cross-examination in an effort to impeach Porter, that churches were morally opposed to "the display of the human body" (App. A, 8a-9a); (2) that Whittier "offered no evidence to support its argument" that the Regulations furthered an important or substantial governmental interest (App. A, 6a), even though the record before the panel included the staff report documenting the results of Whittier's study, as well as the experience of other cities such as Detroit and Boston (App. R, 119a); and (3) the Regulations severely restrict the availability of protected speech, as the panel assumed that "although the ordinance does not by itself ban adult theatres from Whittier, the reluctance of a shoping center owner to lease to such a theatre and the unlikelihood

[1]App. A, 4a. There was actually only one issue on appeal: whether there was sufficient evidence before the City Council to support the 1,000 foot separation of an adult business from a church. Where appellant appeals only a portion of a judgment, and there is no cross-appeal, the reviewing court lacks jurisdiction to review the non-appealed portion, except for possible jurisdictional issues. *See Martin v. Hamil*, 608 F.2d 725, 730-31 (7th Cir. 1974); *Benenson v. United States*, 385 F.2d 26, 31 (2d Cir. 1967).

of an appropriate vacancy will probably have the same effect" (App. A, 7a). The panel did not expressly state that it was reversing the district court, but its Memorandum is contrary to the district court's judgment that except for the facial invalidity of the 1,000 foot separation from a church the Regulations are "valid and subsisting having been properly and lawfully adopted."

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Respect for state judicial processes is a fundamental tenet of our federal system of government.[2] The assumption of jurisdiction and rulings contrary to the final opinion of the California court of appeal by the federal courts in this case offends a basic principle of federalism. There was no justification for relitigating the case in federal court years after the state court processes had begun with the matter before the states' higher courts. By stipulation and district court order, Walnut was free to continue operating its adult theater without threat of civil or criminal prosecution. The California courts, at all levels, have demonstrated that they are fully capable of fairly and judiciously applying priciples laid down by this Court.[3] The Amended Memorandum

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[2]*See Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 129-41 (1941) (discussion of history of Congressional attempts dating back to 1793 to avoid intrusion of federal authority into states' judicial processes).

[3]In fact, the state trial court invalidated Whittier's first ordinance under *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), because it perceived a provision (later deleted) as precluding sufficient access within the City for adult businesses. *See* App. J, 85a. After the first court of appeal opinion, the California Supreme Court granted Walnut's petition for hearing and ordered the appellate court to reconsider its factual determination on the question of availability of other sites. *See* App. G, 65a.

secretly overruling the carefully reasoned opinions of California's appellate courts offends this vital constitutional principle.

1. Res Judicata Bars The Federal Courts From Rejudging The Justification For The Regulations

The single most compelling reason for this Court to undertake plenary review of this case is the opportunity it provides to instruct the lower federal courts of the requirement in our federalist system of respecting the processes and decisions of state courts. The facts and circumstances of this case demonstrate an almost complete indifference on the part of the federal courts involved to determinations made in the California court system.

The Ninth Circuit panel correctly stated that res judicata is not applicable when no final judgment is entered by a state court. However, in doing so the panel mechanically followed a general rule which contains numerous exceptions.

As stated in *Salaman v. Bolt,* 74 Cal.App.3d 907, 141 Cal.Rptr. 841 (1977), even though an appellate opinion orders a limited remand, res judicata may prevent relitigation of issues decided in the appellate opinion. Whether res judicata applies in a given case, depends upon the language of the opinion. *Salaman,* 74 Cal.App.3d at 914-15, 141 Cal.Rptr. at 846.

The federal courts must give a state court's judgment the same preclusive effect as would be given that judgment under applicable state law. *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). Under California law, the decision by the state court of appeal in this case is res judicata on all issues except

the two narrow issues remanded. *Beverly Hills Nat'l Bank v. Glynn,* 16 Cal.App.3d 274, 93 Cal.Rptr. 907 (1971). In *Beverly Hills Nat'l Bank,* the trial court granted judgment for the defendant on the Bank's third and fourth causes of action, holding that there was no consideration for the guarantee executed by the defendant. The appellate court reversed the trial court on this determination, and remanded the case for retrial. *Beverly Hills Nat'l Bank v. Glynn,* 267 Cal.App.2d 859, 868, 73 Cal.Rptr. 808, 813 (1968). On retrial of these two causes of action, defendant again attempted to raise the defense of lack of consideration, contending, as the Ninth Circuit panel held in this case, that under California law a published opinion reversing a trial court and remanding a case has no preclusive effect. The trial and appellate court both held that this defense was foreclosed by the doctrine of res judicata. *Beverly Hills Nat'l Bank,* 16 Cal.App.3d at 288, 93 Cal.Rptr. at 915-16. Therefore, under California law, a case is final for the purpose of applying the doctrine of res judicata, even if there is a remand on some issues. Thus, all issues resolved by the published opinion of the California Court of Appeal (App. F, 45a) cannot be relitigated in this case.

2. The Federal Courts Should Have Abstained From Exercising Jurisdiction In This Case

Because of the ongoing state proceeding, the federal courts should have abstained in this case under the doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and its progeny.[4] In *Younger,* this Court held that

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[4]The fact that the Ninth Circuit Memorandum does not address abstention does not preclude this Court from addressing it. In *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 599 (1975), abstention was not raised below, but this Court held that, because of the quasi-

interference by the federal judicial system with on-going state criminal proceedings runs counter to traditional principles of equity, comity and federalism. *Id.* at 44.

This Court has repeatedly held that *Younger* abstention applies to on-going state civil proceedings which involve important state interests.[5] There is no question that the issues in this case "implicate important state interests."[6] *Middlesex County,* 457 U.S. at 432. As this Court has previously stated, "The city's interest in attempting to preserve the quality of urban life is one that must be accorded the highest respect." *Young,* 427 U.S. at 71; *see also Village of Belle Terre v. Boraas,* 416 U.S. 1, 4-6, 9 (1974). In addition, this case implicates important state interests because the state court proceedings to enforce Whittier's order of abatement bears a close relationship to proceedings of a criminal nature. *Huffman,* 420 U.S. at 604-05. Walnut's violation of the Regulations could have been prosecuted as a criminal offense in state court.

Walnut did not reserve any federal claims in the state action.[7] The issue of the constitutionality of the

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jurisdictional nature of *Younger* abstention, it should consider the issue. In the case at bar, the City filed a motion to abstain in the district court, which expressly ruled abstention not warranted. App. E, 84a.

[5] *Huffman v. Pursue, Ltd.,* 420 U.S. 592 (1975); *Judice v. Vail,* 430 U.S. 327 (1977); *Trainor v. Hernandez,* 431 U.S. 434 (1977); *Moore v. Sims,* 442 U.S. 415, 423 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n.,* 457 U.S. 423, 432 (1982).

[6] At least one circuit court of appeals has held that an ordinance very similar to Whittier's was of sufficient state interest that abstention was appropriate in the face of an on-going state court civil action seeking to enjoin an adult bookstore operator violating the city's ordinance. *Central Ave. News, Inc. v. City of Minot, N.D.,* 651 F.2d 565, 567-68 (8th Cir. 1981).

[7] The state trial court's findings of fact, prepared by counsel for Walnut, state that Walnut "alleged by way of affirmative defense

Regulations were considered by a state trial court, a state appellate court and the California Supreme Court. It is beyond argument that the California courts are able to protect federal constitutional rights.

The history of this case fails to show even minimal respect for state processes. Where vital state interests are involved, the federal courts should abstain unless state law clearly bars the interposition of the constitutional claims. *Moore v. Sims,* 442 U.S. at 426. This Court should take the opportunity which this case provides to instruct the lower federal courts that interference in state court judicial proceedings as evidenced by this case is not to be countenanced.[8]

3. The Ninth Circuit Panel's Treatment Of Legislative Motivate Was In Error

a. Judicial Review of Legislative Motivation is Improper.

Judicial examination into legislative motive constitutes a substantial intrusion into a co-equal branch of

that the ordinance, on its face and as construed and applied to Walnut, violated the free speech, due process and equal protection provisions of the federal and state constitutions." App. J, 85a. Therefore, the element of the *Middlesex County* test requiring an "adequate opportunity" to raise federal claims in the state action is satisfied here. *Middlesex County,* 457 U.S. at 432. The last element of the test, the requirement of a prior state judicial action (*id.*), is obviously met here.

[8]None of the exceptions to *Younger* abstention apply in this case. The fact that Whittier has stipulated on the record that it will not subject Walnut to any additional civil or criminal prosecution pending the outcome of this case and the state litigation demonstrates that the state action was not entered into in "bad faith" or for "harassment." The fact that the Regulations are based on the ordinance approved in *Young* and similar to the ordinance before this Court in *Renton* shows that this is not an "extraordinary" case which presents a "flagrantly and patently" unconstitutional regulation "violative of express constitutional prohibitions in every clause, sentence and paragraph." *Younger,* 401 U.S. at 53-54.

government. The problems inherent in permitting such examination were recognized by this Court 175 years ago in *Fletcher v. Peck*, 6 U.S. (2 Cranch) 87, 130-31 (1810), and they remain today a concern of this Court. *Village of Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 268 n.18 (1977). This Court has frequently stated that it "will not strike down an otherwise constitutional motive on the basis of an alleged illicit motive." *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 472 n.7 (1981); *United States v. O'Brien*, 391 U.S. 367, 383 (1968); *see also Arlington Heights*, 429 U.S. at 265.

In *Young*, the test applied by the plurality was "whether the line drawn by these ordinances is justified by the City's interest in preserving the character of its neighborhoods." 427 U.S. at 71. The plurality in *Young* did not speculate about legislative motive, but agreed with the district court, which found a factual basis for Detroit's regulations and held them constitutional because the stated governmental concerns were legitimate. "When, as here, the City has stated a reason for adopting an ordinance which is a subject of legitimate concern, *that statement of purpose is not subject to attack.*" *Id.* at 56 n.11 (emphasis added), *quoting Nortown Theatre v. Gribbs*, 373 F.Supp. 363, 367 (E.D. Mich. 1974).

Justice Powell's concurring opinion did not inquire into legislative motive either; rather it stated that the *O'Brien* test should be utilized. *Young*, 427 U.S. at 83. As explained by this Court in *O'Brien*, "inquiry into congressional motives or purposes are a hazardous matter" because "what motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it. . . ." 391 U.S. at 384. Similarly, in *Arlington Heights* this Court stated:

> Rarely can it be said that a legislative or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions. 429 U.S. at 265; *see also Pacific Gas & Electric Co. v. Energy Resources Conservation and Development Commission,* 461 U.S. 190, 216 (1983).

b. If Motive is to be Examined, the Ninth Circuit Panel Applied the Wrong Standard.

In each of its Memoranda the panel held that the Regulations would be unconstitutional if "*a* motivating reason for the Council's actions was to suppress protected expression." App. A, 8a; App. C, 24a (emphasis added).[9] This is contrary to well established precedent of this Court that even where one asserted purpose is impermissible, if other valid purposes exist the enactment is constitutional. *See Michael M. v. Sonoma County Superior Court,* 450 U.S. at 472 n.7; *Arlington Heights,* 429 U.S. 252. The panel made no

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[9]The panel's conclusion must, of necessity, be deemed to hold that once an improper motive is inferred, the governing body is forever barred from reenacting the regulations. *See* App. A, 6a. This flies in the face of this Court's statement that it is futile to strike down an otherwise constitutional statute for improper motivation since it would be valid "as soon as the legislature or relevant governing body repassed it for different reasons." *Palmer v. Thompson,* 403 U.S. 217, 225 (1971); *United States v. O'Brien,* 391 U.S. at 384.

inquiry to determine if there were other legitimate purposes which justify the Regulations.

The panel seems to rely on *Arlington Heights* for its "*a* motivating factor" test.[10] This is erroneous. Judicial deference was set aside in *Arlington Heights* only because racial discrimination was involved. Moreover, in *Arlington Heights* this Court's analysis did not end when it found an improper motive; it went on to determine if there were other purposes which would justify the legislation. The panel was presented with ample evidence of legitimate governmental reasons which justify the Regulations. *See* App. R, 119a.[11]

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[10]Although the panel made no mention of *Arlington Heights* in this case in holding that any illegitimate purpose would invalidate a statute, it did state in *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 537 n.17 (9th Cir. 1984), *prob. juris. noted*, ___ U.S. ___, 105 S.Ct. 2015, that this test "is consistent with other constitutional cases regarding land use decisions" and cited *Arlington Heights*.

[11]Over the past two years the Ninth Circuit has failed to apply a consistent standard in analyzing the constitutionality of adult business zoning ordinances. A "real purpose" test has been applied by the court in *Ebel v. City of Corona* (Ebel II), 767 F.2d 635 (9th Cir. 1985); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1299 (9th Cir. 1984); *Lydo v. City of Las Vegas*, 745 F.2d 1211, 1215 (9th Cir. 1984); and *Ebel v. City of Corona* (Ebel I), 698 F.2d 390, 393 (9th Cir. 1983). In other cases, however, the Ninth Circuit has looked to see if there was a single impermissible motivating factor. *Walnut Properties, Inc. v. City of Whittier*, App. A, 8a; *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 537 (9th Cir. 1984); *Tovar v. Bellmeyer*, 721 F.2d 1260, 1267 (9th Cir. 1983) *cert. denied*, ___ U.S. ___, 105 S.Ct. 223 (1984). In *Renton*, the court limited this test to where mixed motives are apparent, but there was no such limiting language in this case.

All of these decisions of the Ninth Circuit are contrary to the decision of the Fourth Circuit in *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 829 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) in which the court stated that it is "best to eschew altogether the 'guesswork' of speculating about the motive of lawmakers [and instead] look in the final analysis to the legislation itself."

c. There Was No Evidence That Any Member of the City Council Had an Improper Motive.

Even if this Court were to overturn past precedent and determine that inquiry into legislative motive is relevant, there is no evidence in the record of improper motive. In its first Memorandum, the panel based its determination of improper motivation upon the incorrect conclusion that Porter, Whittier's planning director, had objectively reported that churches had expressed opposition to displays of nudity. App. C, 24a. The panel also stated that such factors as the timing of the ordinance, the lack of a grandfather clause, and the conditional use permit requirement which by themselves did not support an inference of improper motive, would support such an inference when coupled with Porter's statement. *Id.* at 25a.

In its petition for rehearing, Whittier pointed out: (1) that Porter had not so "reported"; (2) that certified hearing transcripts showed that no statement had been made by anyone regarding purported church aversion to displays of nudity; and (3) that Whittier's municipal code, which had been admitted into evidence, *did* contain a "grandfather clause."

In its Amended Memorandum the panel changed its rationale for its finding of improper motivation, stating that Porter had testified without objection that the justification of the ordinance was that "churches were morally opposed to the display of the human body." App. A, 8a. The court also referred once again to the timing of the ordinance [12] and the lack of a grandfather

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[12]The original ordinance was adopted to impose a moratorium on the rapid growth of adult businesses in Whittier while a study could be performed. App. Q, 113a. Walnut was already in operation

clause[13] as further evidence of improper motive upon which the district court could properly rely. App. A, 8a-9a. Even though the panel acknowledged that testimony could not be admitted if it speculated about the subjective intentions of the individual legislators (*id.*), it used Porter's statement as evidence of the motives of the City Council.

In *Young*, statements had been made to both the mayor and the common council about pornography being "disgusting." Appendix in *Young* at 26, 48. Had this Court allowed motives of third parties to be imputed to that legislative body it would have had to have found an improper legislative motive. Instead, this Court held that there was a factual basis which justified the ordinance ordinance and made an inquiry into legislative motive pointless. *See also Arlington Heights,* 429 U.S. at 267-70 (motives of third parties not to be imputed to the legislators).

4. Whitier's Adult Business Regulations Are Valid Under *Young*

a. The Regulations are Justified.

Regarding the element of the *O'Brien* test which requires that the regulation further an important or substantial government interest (391 U.S. at 377), the

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as an adult business at this time. *See* App. R, 120a. It is sheer speculation to presume that the timing of the ordinance was to suppress protected speech and not to study the effects of the recent influx of these businesses. *Cf. Tovar v. Billmeyer,* 721 F.2d at 1264-65.

[13]This is a further example of the panel's failure to respect the California courts. The California court of appeal explicitly held Whittier's amortization of legal nonconforming uses regulation constitutional as applied to Walnut. App. F, 55a-56a. The panel not only rejected this holding, but found this amortization regulation to be evidence of an improper motive.

panel stated that "[t]he City offered no evidence to support its argument." App. A, 6a. The 1978 staff report, presented at the Planning Commission and City Council hearings, documents the results of seven months of study showing the increased crime rates, decreased property values, and nuisances created by the concentration of adult businesses in Whittier. App. R., 119a.[14] That report and the 1983 staff report, when the 1,000 foot separation from a church was readopted, also refer to the experiences of other nearby cities, a similar study conducted by the County of Los Angeles, a report of the American Society of Planning Officials and, of course, the *Young* opinion. The district court was of the view that the original staff report justified the regulation except as to the church separation requirement. The district court did not perceive any rationale for the separation from a church in the staff report because it refused to consider the experiences of other cities relevant. The rationale for separating adult businesses from a church by 1,000 feet is that the separation will keep such uses a block apart[15] so that persons, especially children, attending church schools and other church related activities, are not immediately confronted with the well known secondary effects of

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[14]The panel rejected Whittier's evidence as to the problems associated with the concentration of adult businesses because "[t]here is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one." App. A, 6a. At the time the staff report was prepared there were thirteen adult businesses within the City. App. R, 120a. The justification for the Regulations must be measured by the conditions that existed at the time of their enactment, not conditions in existence over seven years later.

[15]The panel's fact finding as to the length of the blocks in the City of Whittier is incorrect. In fact, as the map submitted into the record shows, the blocks in the Village area are 600 to 700 feet long. Other City blocks exceed 1,000 feet.

adult businesses. The record below demonstrates that today, as well as historically, churches are used not only for worship, but also as schools,[16] social halls for people of all ages, and for other family oriented activities. These uses are patently incompatible with adult business uses. In fact, such Regulations are commonplace in California. Many reported California cases concerning adult business zoning regulations contain a separation provision relating to churches and adult business.[17]

The church separation is justified by Whittier's interest in preserving the character of its neighborhoods which, as documented in the staff reports, suffered deleterious secondary effects from adult businesses in Whittier. It is not required that the City prove that the zoning regulation is justified as to each and every adult business that may be or want to locate in the City. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926). Nor are unsupported claims of economic hardship sufficient to invalidate the Regulations. As was stated in *Young*, such locational regulations "may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious

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[16]Two schools operated by churches are located within 1,000 feet of the Theater.

[17]The following cases all concerned ordinances which included such a provision: *Ebel v. City of Corona*, 698 F.2d 390 (9th Cir 1983); *City of Vallejo v. Adult Books*, 167 Cal.App.3d 1169, 213 Cal.Rptr. 143 (1985); *Strand Properties, Inc. v. Municipal Court*, 148 Cal.App.3d 882, 200 Cal.Rptr. 47 (1983) (City of San Diego); *Walnut Properties, Inc. v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, *cert. denied*, 449 U.S. 836 (1980).

economic damage." 427 U.S. at 78 (Powell, J. concurring) (citation omitted).

If zoning regulations operate unfairly as applied to a particular use, the proper procedure is to seek a variance. Cal. Gov't. Code § 65906. Walnut never sought a zone variance or submitted any evidence to Whittier that the Regulations would create a hardship as to it. *See* App. F, 45a.

b. The Regulations do not Suppress or Unreasonably Restrict Access to or for Adult Businesses.

Porter, the planning director, testified that within Whittier, of the 742.5 acres zoned for adult uses (C-2 and M), 99.5 acres, or 13.4% of the total, are available to adult businesses under the Regulations' locational requirements.[18] These sites are along major thoroughfares, in economically viable areas of the City, in one of the two shopping centers located in the City, but not in Whittier's central business district. The panel was apparently of the view that an adult theater has a vested constitutional right to locate in a central business district. The shopping center site was discarded by the panel with the unsupported conclusion that "the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy" makes the shopping center constitutionally unavailable. App. A, 7a. There is no evidence in the record to support this conclusion, and it is contrary to the determination of the district court. There are no general release theaters in Whittier's central business district. The only general

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[18]The Ninth Circuit panel incorrectly described the testimony of both Mr. Porter and Walnut's witness, Mr. Metcalfe, a real estate appraiser. *See* RT, at 113, 134-35, 164.

release theater is located in one of the City's two shopping centers, which is also available for Walnut's theater under the Regulations.

Were general release theaters subject to the same locational requirements would "the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy" invalidate the zoning? Does an adult business or for that matter, any theater, have a constitutional right to locate "downtown?"

Finally, without explanation or reason, the panel concluded that an area zoned industrial, but in which commercial uses are permitted, and, in fact, flourish, is constitutionally unsuitable for adult businesses. *See* App. A, 7a-8a.

The approach of the Ninth Circuit in this and the *Renton* case has been to elevate adult businesses over all other First Amendment activities, such as churches, which are subject to zoning and other licensing requirements, and to ignore the market factors beyond a city's control. This Court should grant plenary review to instruct the federal courts on the need to respect legislative solutions to the problems caused by the secondary effects of adult businesses.

CONCLUSION

For the reasons expressed above, this Court should note probable jurisdiction and accept this case for plenary review or at least hold this appeal pending this Court's disposition of the *Renton* case.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

J. ROBERT FLANDRICK, CITY ATTORNEY,
CITY OF WHITTIER

KATHERINE E. STONE

BENJAMIN S. KAUFMAN

LISA E. KRANITZ

Counsel for Appellants
THE CITY OF WHITTIER, a Charter City, et al.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 27, 1985, I served the within *Jurisdictional Statement* and *Appendix to Jurisdictional Statement* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Stanley Fleishman, Esq.
2049 Century Park East
Suite 3160
Los Angeles, California 90067

The Honorable John Van De Kamp
Attorney General
555 Capitol Mall
Suite 350
Sacramento, California 95814

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 27, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

85-1116

Supreme Court, U.S.
FILED
DEC 30 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO JURISDICTIONAL STATEMENT

BURKE, WILLIAMS & SORENSEN
J. ROBERT FLANDRICK,* CITY ATTORNEY,
CITY OF WHITTIER
KATHERINE E. STONE
BENJAMIN S. KAUFMAN
LISA E. KRANITZ
One Wilshire Building, 11th Floor
624 South Grand Avenue
Los Angeles, California 90017
Telephone: (213) 623-1900
Counsel for Appellants
*Counsel of Record

Westside Law Publishers Los Angeles, California (213) 477-0491

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual, Plaintiffs-Appellees, v. CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier, Defendants-Appellants.	Nos. 84-5755, 84-6087 D.C. No. CV 81-2262-R AMENDED MEMORANDUM*

FILED
SEP 3 0 1985
CLERK, U.S. COURT OF APPEALS

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Argued and submitted —
February 8, 1985, Pasadena, California

*The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the rules of this court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter*, and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,** District Judge.

The City of Whittier (City) appeals a declaration that its zoning ordinance is unconstitutional. It also asserts the action below was barred by the doctrine of res judicata. The state action to which it refers did not result in a final judgment; therefore, res judicata does not apply. The ordinance violates the first amendment because it was not shown to justify legitimate government needs, because it severely restricts protected speech and because one of the City's reasons for enacting the ordinance was to suppress that speech. The district court's award of attorneys' fees to appellee was not an abuse of discretion.

Discussion

A. Res Judicata

In its opening brief, the City argues, without distinguishing them, that the doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) barred the district court suit. The two will be dealt with separately.

Res judicata bars a party from relitigating not only issues actually decided in a prior suit but also all those stemming from the same cause of action. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School District,* No. 81-5772, slip op. at 8 (9th Cir. Feb. 21, 1985) (en banc); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 & n.4 (1981) [hereinafter cited as Wright, Miller & Cooper]. Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. 28 U.S.C. § 1738 (1982); *Migra v. Warren*

**Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

City School District Board of Education, ___ U.S. ___, 104 S. Ct. 892, 896-98 (1984); *Los Angeles NAACP,* slip op. at 8. In California, subsequent litigation is precluded 1) between the same parties, 2) on the same cause of action, if 3) "the first suit concluded in a final judgment on the merits." *Los Angeles NAACP,* slip op. at 8 (citing *Agarwal v. Johnson,* 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); *Slater v. Blackwood,* 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). Plaintiff Walnut Properties, Inc. does not dispute that the first two requirements are satisfied here.

But no final judgment has issued from the state courts on whether Ordinance No. 2257 is constitutional as applied. The second state appellate decision did not purport to determine this question. *See* 149 Cal. App. 3d 633, 642, 197 Cal. Rptr. 127, 133 ("*If* [it] does not prevent the entry of new theatres into the market place, the ordinance is not unconstitutional as applied") (emphasis supplied; citation omitted). Instead it remanded to the state trial court. *Id.* The City's assertion that the state appellate court "decided the Ordinances were constitutional in all respects" is most charitably deemed wishful thinking. Federal law is clear that no preclusive effect is given when the appellate court reverses the trial court and remands for further proceedings, but no remand hearing is held. *E.g., Aurora City v. West,* 74 U.S. (7 Wall.) 82, 93 (1868) (where judgment for plaintiff was reversed and remanded, defendant could not invoke res judicata); *Los Angeles NAACP v. Los Angeles Unified School District,* 518 F. Supp. 1053, 1058-59 (C.D. Cal. 1981), *rev'd on other grounds,* No. 81-5772; *see also* Wright, Miller & Cooper, *supra,* §4432, at 302-04 & n.22 ("If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all.").

B. Collateral Estoppel

Collateral estoppel or issue preclusion is a distinct doctrine from res judicata. It prevents 1) the same parties from relitigating 2) the same issue of fact or law which was actually litigated previously 3) after a full and fair opportunity to litigate 4) which resulted in a final judgment on the merits. *See, e.g.,* Wright, Miller & Cooper, *supra*, § 4416; *see generally Bernhard v. Bank of America National Trust & Savings Association,* 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

Of the three factual issues on appeal, the state courts have clearly not decided whether alternative sites exist for the Wardman Theatre in Whittier and have apparently not decided whether the ordinances were motivated by a desire to restrict speech. (In its first, vacated opinion, the appellate court had based its finding that the ordinance was not unconstitutionally motivated on its "finding" that alternative sites were available to Walnut. It did not comment on the motivation issue in its second opinion.) The district court was not estopped from deciding these issues. *See Bleeck v. State Board of Optometry,* 18 Cal. App. 3d 415, 429, 95 Cal. Rptr. 860, 869 (1971).

Although the language it used is somewhat ambiguous, we do not believe the state appellate court decided whether the City had narrowly tailored the ordinance to a compelling government need.

> In assessing the reasonableness of a regulation we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interest but must leave

> open adequate alternative channels of communication. . . .
>
> In the case at bench, the zoning ordinance . . . is reasonable as to time, place and manner if it leaves open alternative channels of communication . . . and does not violate the First Amendment. . . .
>
> . . . .
>
> . . . If the ordinance herein merely disperses adult theatres . . . [i]t is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

149 Cal. App. 3d at 641-42. The court apparently believed that whether the ordinance was narrowly tailored to a valid interest and whether there were adequate alternative channels, are two questions that are intertwined. In other words, it believed the ordinance would be "narrowly tailored" only if sufficient sites remained for the protected speech.

We do not believe the state appellate court decided whether the ordinance was narrowly tailored to a valid interest and we therefore hold the district court was not estopped from deciding this question.

C. Constitutionality

We need not decide whether the appropriate standard of review for these issues is de novo or clear error, *see generally United States v. McConney,* 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc) (some mixed questions of law and fact reviewed de novo, some reviewed for clear error), *cert. denied,* 105 S. Ct. 101 (1984); *Playtime Theaters, Inc. v. City of Renton,* 748 F.2d 527, 535 (9th Cir. 1984) (some first amendment issues reviewed de novo); *also Pullman-Standard v.*

Swint, 456 U.S. 273, 288-89 (1982) (motive a "pure question of fact"), for under either standard we affirm the findings of the district court.

1. Governmental Interests

"[F]ederal courts strictly scrutinize zoning decisions that impinge on first amendment rights." *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984). "[T]he incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 79-80 (1976) (Powell, J., concurring)).

The City offered no evidence to support its argument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.

Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordinance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable *Young* case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the

Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

2. Availability of Other Sites

If the ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first amendment. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76 (1981); *Alexander v. City of Minneapolis,* 698 F.2d 936, 938-39 (8th Cir. 1983); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theatre could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. Walnut contends these acres will also be unavailable if the Center is considered to be one "lot" for the purposes of the ordinance. The district court was entitled to believe Mr. Metcalfe, and although the ordinance does not by itself ban adult theatres from Whittier the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy will probably have the same effect. In any event, this court may take judicial notice of the fact that a circle with a radius of 1,000 feet covers an area of seventy-three acres. Thus, if one theatre located

in the Whitwood Center, all other adult businesses would be barred from the City.

3. Motive

An ordinance is also unconstitutional if "a motivating reason for the Council's actions" was "to suppress protected expression." *Tovar,* 721 F.2d at 1266 (modifying previous test that "the real purpose" of the ordinance had to be suppression). The district court found that the City's action was improperly motivated. It based that finding at least in part on deposition testimony by Mr. Porter, the City Planning Director. Without objection Porter testified that the staff report recommending the original emergency ordinance did not state a justification for the ordinance, but that the actual justification was that churches were morally opposed to "the display of the human body."

Porter's testimony is admissible for determining the motive behind the ordinance if it showed objectively "the chain of events from which intent may be inferred." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984); *Tovar,* 721 F.2d at 1264-67; *Ebel v. City of Corona,* 698 F.2d 390, 393 (9th Cir. 1983). Testimony may not be admitted, however, which speculates about the subjective intentions of individual legislators. *See Foley,* 747 F.2d at 1298-99. We consider the testimony, in the absence of objection, as a statement of the chain of events leading to the ordinance's enactment.

We observe a number of characteristics of the ordinance and events surrounding its enactment also support a finding of improper motive. For example, the first emergency ordinance was passed very shortly after Walnut began to show adult films and at a time when some groups in Whittier protested an adult theatre's locating there. The ordinance did not contain a

grandfather clause and no valid governmental purpose has been shown for it. The district court could also have properly relied on these objective facts. We therefore affirm the finding of improper motive.

D. Attorney's Fees

Walnut, as a successful plaintiff in an action brought under 42 U.S.C. § 1983 (1982), moved for $39,035 in attorneys' fees, which amount the district court awarded. The City contends that only $3,862 should be allowed. This court reviews the amount of the award for abuse of discretion. *See* 42 U.S.C. § 1988 (1982); *Blum v. Stenson,* ___ U.S. ___, 104 S. Ct. 1541, 1545 (1984); *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 838 n.8 (9th Cir. 1982). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 104 S. Ct. at 1543-44.

1. Hourly Rate

This court has declined to endorse the "lodestar approach" used in other circuits under which, absent special circumstances, the starting figure for an hourly rate should be "counsel's normal billing rate." *Moore,* 682 F.2d at 840. Instead, it adheres to a list of twelve factors for determining the fee award as a whole. *See id.* at 838 (listing factors), 840 (approving *Kerr v. Screen Extras Guild, Inc.,* 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied,* 425 U.S. 951 (1976)). The factors which seem to directly affect an attorney's hourly rate include the skill required in the case, the customary fee, the experience, reputation, and ability of the attorney, and the length of the professional relationship with the client.

Walnut's hourly rate is not unreasonable for a case which wound its way through five different courts and

for an attorney who has orally argued ten cases before the United States Supreme Court, who has practised for thirty-five years, and who has been awarded $200 per hour in another matter.

This conclusion is reinforced by the fact that the City failed to develop any evidence from an impartial expert witness that the rate was unreasonable.

2. Hours Spent on "Unsuccessful Claims"

In *Hensley v. Eckerhart,* 461 U.S. 424, 434 (1983), the Supreme Court stated that "[i]n some cases a plaintiff may present in one lawsuit distinctly different claims for relief that are based on different facts and legal theories." In such a case, if the plaintiff succeeds on only some of his claims, he will not be awarded attorneys fees for time spent on unsuccessful claims. *Id.* at 435.

Although Walnut's complaint did allege violations of several constitutional provisions and amendments, each stemmed from a common factual predicate. Furthermore, in *Blum,* the Court stated: "[W]e reiterate what was said in *Hensley:* 'where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation.' " 104 S. Ct. at 1550 (quoting *Hensley,* 461 U.S. at 435). In fact this highlights that the *Hensley* case involved a plaintiff who obtained less *relief* than it had sought. *See Hensley,* 461 U.S. at 436-37. In this case, as the district court observed, plaintiff received all the relief it asked for. Here, too, the City failed to introduce any evidence that the time spent was unreasonable. Walnut will be compensated for all hours reasonably spent as found by the district court.

3. Contemporaneous Logs

The City observes that the *Hensley* Court permitted the district court there to reduce an award of attorneys' fees in part because of "inadequate documentation." *Hensley*, 461 U.S. at 433. But the Court also stated that "[w]e reemphasize that the district court has discretion in determining the amount of a fee award." *Id.* at 437. The district court here did not make such a reduction and it is not an abuse of discretion not to do so. *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465, 1473 (9th Cir. 1983).

4. Mr. Metcalfe

The City argues that "[a]ll the time [Walnut's attorney] spent with Mr. Metcalfe must be deducted because Mr. Metcalfe's expertise and testimony at trial had nothing whatsoever to do with the issue on which Walnut prevailed." From the discussion above, it is apparent that Mr. Metcalfe was a critical witness whose testimony persuaded the district court to find for Walnut on an important issue.

5. Different Tasks

The City cites one authority in this circuit for the proposition that the trend in the Ninth Circuit is to differentiate between the kinds of legal work involved. *Chapman v. Pacific Telephone and Telegraph Co.*, 456 F. Supp. 77 (N.D. Cal. 1978). No authority appears for the proposition that failing to do so is an abuse.

In *Hensley*, the Court admonished that a "request for attorney's fees should not result in a second major litigation." 461 U.S. at 437. The district court was aware of the different tasks performed by Walnut's attorneys and awarded an average rate based on all. This efficient procedure should not be deemed an abuse by a panel

aware of the great discretion vested in trial courts to award reasonable fees.

CONCLUSION

The district court was not barred from determining whether the ordinance violated the first amendment as applied or any of the factual issues allegedly determined in the prior action. Its findings that the ordinance had been unconstitutionally motivated, that it had an unconstitutional effect, and that the infringement it caused had not been justified are each a basis for declaring the ordinance unconstitutional and we affirm each. Finally, the court did not abuse its discretion in awarding reasonable attorneys' fees.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 3 01985

CLERK, U.S. COURT OF APPEALS

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual,

Plaintiffs-Appellees,

v.

CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier,

Defendants-Appellants.

Nos. 84-5755, 84-6087

D.C. No. CV 81-2262-R

ORDER

On appeal from the United States District Court for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The panel has voted to make the following amendments to the Memorandum:

Replace the language at page 8, line 19 through page 10, line 4, with the following:

> court found that the City's action was improperly motivated. It based that finding at least in part on deposition testimony by Mr. Porter, the City Planning Director. Without objection Porter testified that the staff report recommending the original emergency ordinance did not state a justification for the ordinance, but that the actual justification was that churches were morally opposed to "the display of the human body."
>
> Porter's testimony is admissible for determining the motive behind the ordinance if it showed objectively "the chain of events from which intent may be inferred." *City of Las Vegas v. Foley,* 747 F.2d 1294, 1298 (9th Cir. 1984); *Tovar,* 721 F.2d at 1264-67; *Ebel v. City of Corona,* 698 F.2d 390, 393 (9th Cir. 1983). Testimony may not be admitted, however, which speculates about the subjective intentions of individual legislators. *See Foley,* 747 F.2d at 1298-99. We consider the testimony, in the absence of objection, as a statement of the chain of events leading to the ordinance's enactment.
>
> We observe a number of characteristics of the ordinance and events surrounding its enactment also support a finding of improper motive. For example, the first emergency ordinance was passed very shortly after Walnut began to show adult films and at a time when

> some groups in Whittier protested an adult theatre's locating there. The ordinance did not contain a grandfather clause and no valid governmental purpose has been shown for it. The district court could also have properly relied on these objective facts. We therefore affirm the finding of improper motive.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Memorandum is amended as set forth herein. The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 14 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual, Plaintiffs-Appellees, v. CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Mebers of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier, Defendants-Appellants.	Nos. 84-5755, 84-6087 D.C. No. CV 81-2262-R M E M O R A N D U M*

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Argued and submitted —
February 8, 1985, Pasadena, California

*The panel has concluded that the issues presented by this appeal do not meet the standards set by rule 21 of the rules of this court for disposition by written

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,** District Judge.

The City of Whittier (City) appeals a declaration that its zoning ordinance is unconstitutional. It also asserts the action below was barred by the doctrine of res judicata. The state action to which it refers did not result in a final judgment; therefore, res judicata does not apply. The ordinance violates the first amendment because it was not shown to justify legitimate government needs, because it *severely* restricts protected speech and because one of the City's *reasons* for enacting the ordinance was to suppress that speech. The district court's award of attorneys' fees to appellee was not an abuse of discretion.

Discussion

A. Res Judicata

In its opening brief, the City argues, without distinguishing them, that the doctrines of res judicata (or claim preclusion) and collateral estoppel (or issue preclusion) barred the district court suit. The two will be dealt with separately.

Res judicata bars a party from relitigating not only issues actually decided in a prior suit but also all those stemming from the same cause of action. *See, e.g., Los Angeles Branch NAACP v. Los Angeles Unified School District,* No. 81-5772, slip op. at 8 (9th Cir. Feb. 21,

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opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the *Federal Reporter,* and that this memorandum may not be cited to or by the courts of this circuit save as provided in rule 21(c).

**Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

1985) (en banc); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4406 & n.4 (1981) [hereinafter cited as Wright, Miller & Cooper]. Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. 28 U.S.C. § 1738 (1982); *Migra v. Warren City School District Board of Education,* ___ U.S. ___, 104 S. Ct. 892, 896-98 (1984); *Los Angeles NAACP,* slip op. at 8. In California, subsequent litigation is precluded 1) between the same parties, 2) on the same cause of action, if 3) "the first suit concluded in a final judgment on the merits." *Los Angeles NAACP,* slip op. at 8 (citing *Agarwal v. Johnson,* 25 Cal. 3d 932, 954, 603 P.2d 58, 72, 160 Cal. Rptr. 141, 155 (1979); *Slater v. Blackwood,* 15 Cal. 3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (1975)). Plaintiff Walnut Properties, Inc. does not dispute that the first two requirements are satisfied here.

But no final judgment has issued from the state courts on whether Ordinance No. 2257 is constitutional as applied. The second state appellate decision did not purport to determine this question. *See* 149 Cal. App. 3d 633, 642, 197 Cal. Rptr. 127, 133 ("*If* [it] does not prevent the entry of new theatres into the market place, the ordinance is not unconstitutional as applied") (emphasis supplied; citation omitted). Instead it remanded to the state trial court. *Id.* The City's assertion that the state appellate court "decided the Ordinances were constitutional in all respects" is most charitably deemed wishful thinking. Federal law is clear that no preclusive effect is given when the appellate court reverses the trial court and remands for further proceedings, but no remand hearing is held. *E.g., Aurora City v. West,* 74 U.S. (7 Wall.) 82, 93 (1868) (where judgment for plaintiff was reversed and remanded,

defendant could not invoke res judicata); *Los Angeles NAACP v. Los Angeles Unified School District,* 518 F. Supp. 1053, 1058-59 (C.D. Cal. 1981), *rev'd on other grounds,* No. 81-5772; *see also* Wright, Miller & Cooper, *supra,* §4432, at 302-04 & n.22 ("If the matter is dropped after remand without proceeding to a new final judgment, there is no preclusion at all.").

B. Collateral Estoppel

Collateral estoppel or issue preclusion is a distinct doctrine from res judicata. It prevents 1) the same parties from relitigating 2) the same issue of fact or law which was actually litigated previously 3) after a full and fair opportunity to litigate 4) which resulted in a final judgment on the merits. *See, e.g.,* Wright, Miller & Cooper, *supra,* § 4416; *see generally Bernhard v. Bank of America National Trust & Savings Association,* 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

Of the three factual issues on appeal, the state courts have clearly not decided whether alternative sites exist for the Wardman Theatre in Whittier and have apparently not decided whether the ordinances were motivated by a desire to restrict speech. (In its first, vacated opinion, the appellate court had based its finding that the ordinance was not unconstitutionally motivated on its "finding" that alternative sites were available to Walnut. It did not comment on the motivation issue in its second opinion.) The district court was not estopped from deciding these issues. *See Bleeck v. State Board of Optometry,* 18 Cal. App. 3d 415, 429, 95 Cal. Rptr. 860, 869 (1971).

Although the language it used is somewhat ambiguous, we do not believe the state appellate court decided whether the City had narrowly tailored the ordinance to a compelling government need.

> In assessing the reasonableness of a regulation we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interests but must leave open adequate alternative channels of communication. . . .
>
> In the case at bench, the zoning ordinance . . . is reasonable as to time, place and manner if it leaves open alternative channels of communication . . . and does not violate the First Amendment. . . .
>
> . . . .
>
> . . . If the ordinance herein merely disperses adult theatres . . . [i]t is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

149 Cal. App. 3d at 641-42. The court apparently believed that whether the ordinance was narrowly tailored to a valid interest and whether there were adequate alternative channels, are two questions that are intertwined. In other words, it believed the ordinance would be "narrowly tailored" only if sufficient sites remained for the protected speech.

We do not believe the state appellate court decided whether the ordinance was narrowly tailored to a valid interest and we therefore hold the district court was not estopped from deciding this question.

C. Constitutionality

We need not decide whether the appropriate standard of review for these issues is de novo or clear error, *see*

generally United States v. McConney, 728 F.2d 1195, 1199-1204 (9th Cir. 1984) (en banc) (some mixed questions of law and fact reviewed de novo, some reviewed for clear error), *cert. denied*, 105 S. Ct. 101 (1984); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527, 535 (9th Cir. 1984) (some first amendment issues reviewed de novo); *also Pullman-Standard v. Swint*, 456 U.S. 273, 288-89 (1982) (motive a "pure question of fact"), for under either standard we affirm the findings of the district court.

1. Governmental Interests

"[F]ederal courts strictly scrutinize zoning decisions that impinge on first amendment rights." *Tovar v. Billmeyer*, 721 F.2d 1260, 1264 (9th Cir. 1983), *cert. denied*, 105 S. Ct. 223 (1984). "[T]he incidental restriction on first amendment freedoms can be 'no greater than is essential to the furtherance' of the governmental interest." *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50. 79-80 (1976) (Powell, J., concurring)).

The City offered no evidence to support its argument. It cited cases holding that concentrations of adult businesses caused urban blighting and that a municipality could legitimately require these businesses not to locate near one another. There is no concentration of adult theatres in Whittier; in fact the Wardman Theatre is the only one. Furthermore, this interest might logically support the ordinance's requirement that adult businesses be 1,000 feet apart, but not that they be 1,000 feet from a church.

Even if we take notice of the staff report produced at the time Ordinance No. 2327 was enacted and of the latest ordinance, as the City has asked us to do, we arrive at the same conclusion. The report itself and the later statements again rely on the inapplicable *Young*

case for the proposition that concentrations of adult businesses have an adverse effect on neighborhoods. And the report asserts that a separation of 1,000 feet is needed because it will "for the most part prevent[] [adult businesses] from locating within the same block as a church." The map of Whittier Village introduced by the City reveals that all the blocks which surround the Wardman are 500 feet on their longest side. It is therefore apparent that the 1,000 feet requirement is not necessary to prevent such theatres from being located in the same block as a church.

2. Availability of Other Sites

If the ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first amendment. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 76 (1981); *Alexander v. City of Minneapolis,* 698 F.2d 936, 938-39 (8th Cir. 1983); *Basiardanes v. City of Galveston,* 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

The evidence on this issue included the testimony of Mr. Porter, the City Planning Director, for the City of Whittier, and Mr. Metcalfe, a real estate appraiser, for Walnut Properties. Mr. Porter testified that there were thirty-five acres in Whittier upon which an adult theatre could be located. Mr. Metcalfe testified that there were twelve acres, all of which were in the Whitwood Shopping Center. Walnut contends these acres will also be unavailable if the Center is considered to be one "lot" for the purposes of the ordinance. The district court was entitled to believe Mr. Metcalfe, and although the

ordinance does not by itself ban adult theatres from Whittier, the reluctance of a shopping center owner to lease to such a theatre and the unlikelihood of an appropriate vacancy will probably have the same effect. In any event, this court may take judicial notice of the fact that a circle with a radius of 1,000 feet covers an area of seventy-three acres. Thus, if one theatre located in the Whitwood Center, all other adult businesses would be barred from the City.

3. Motive

An ordinance is also unconstitutional if "a motivating reason for the Council's actions" was "to suppress protected expression." *Tovar,* 721 F.2d at 1266 (modifying previous test that "the real purpose" of the ordinance had to be suppression). The district court's finding that the City's action was improperly motivated is also supported by the record. Mr. Porter stated that one reason for the church provision was that "most churches are against the display of the human body" and that adult theatres conflict with the morals of the churches. The City argues that Mr. Porter was not a City Council member and that his testimony is therefore not probative. It contends that under California law the council's motives cannot be probed. In *City of Las Vegas v. Foley,* 747 F.2d 1294, 1299 (9th Cir. 1984), this court prohibited plaintiffs from deposing council members to inquire into their states of mind. But in *Tovar* we approved of deposition testimony by the mayor that he had called a special meeting "to see what the City Council could do about getting [the theatre] out of Pocatello." *Foley,* 747 F.2d at 1298. Clearly the testimony of Mr. Porter is allowed in this case insofar as he reports objectively what concerns were voiced at City meetings.

Walnut also points out that the timing of the ordinance is suspect, that it did not contain a grandfather clause, and that it required every adult business to obtain a conditional use permit. By themselves, these facts might not support an inference of improper motive, but coupled with Mr. Porter's statements and the absence of a showing that the ordinance is narrowly tailored to a valid purpose, they do.

Thirdly, *Foley* states of *Ebel v. City of Corona,* 698 F.2d 390 (9th Cir. 1983), that

> objective evidence in that case indicated that the defendant city was attempting to suppress free speech. Ebel's was the only adult bookstore in town. It is doubtful that forcing it to relocate could have much of an impact on urban blight. . . . [T]he facts sufficiently indicated that the City['s] only purpose was to harass the bookstore by requiring it to relocate.

747 F.2d at 1299 (citation omitted). The same facts are present here.

Even if they are noticed, the minutes of the post hoc meeting at which the City reenacted the ordinance for the ostensible purpose of "prevent[ing] an irreconcilable incompatibility of uses" do not disturb the finding that "*a* motivating reason" for the ordinance was improper. This is especially true since the minutes reveal clearly that the purpose of the reenactment was to avoid the impact of the district court's findings.

D. Attorney's Fees

Walnut, as a successful plaintiff in an action brought under 42 U.S.C. § 1983 (1982), moved for $39,035 in attorneys' fees, which amount the district court awarded. The City contends that only $3,862 should be allowed.

This court reviews the amount of the award for abuse of discretion. *See* 42 U.S.C. § 1988 (1982); *Blum v. Stenson,* ___ U.S. ___, 104 S. Ct. 1541, 1545 (1984); *Moore v. Jas. H. Matthews & Co.,* 682 F.2d 830, 838 n.8 (9th Cir. 1982). "The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate." *Blum,* 104 S. Ct. at 1543-44.

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v. California Health & Welfare Agency, 704 F.2d 1465, 1473 (9th Cir. 1983).

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CONCLUSION

The district court was not barred from determining whether the ordinance violated the first amendment as applied or any of the factual issues allegedly determined in the prior action. Its findings that the ordinance had been unconstitutionally motivated, that it had an

unconstitutional effect, and that the infringement it caused had not been justified are each a basis for declaring the ordinance unconstitutional and we affirm each. Finally, the court did not abuse its discretion in awarding reasonable attorneys' fees.

AFFIRMED.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
MAR -8 1984
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Deputy
By

FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA,

Plaintiffs,

v.

CITY OF WHITTIER, a Charter City, et al.,

Defendants.

CV 81-2262-R

JUDGMENT

The Court, having made its Findings of Fact and Conclusions of Law, now makes the following Judgment:

1. That Ordinance Nos. 2116, 2121, 2128, 2138, 2254, and 2257, as adopted by the City Council of the City of Whittier, are, except as is expressly hereinafter set forth, valid and subsisting, having been properly and lawfully adopted by the said City Council. The exception, above referred to, is that that portion of Ordinance No. 2257 which prohibits the location of an adult business within 1,000 feet of a church (subsection (2) of Section (c) of Section

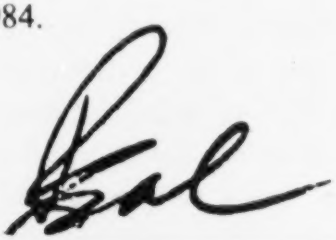
9512.1 of the Whittier Municipal Code as adopted by Ordinance No. 2257), is declared invalid on the ground that at the time of the public hearing preceding the enactment of the said ordinances, there was insufficient evidence presented to the City Council to support its conclusion that this portion of the regulations was reasonably required to protect the public health, safety and general welfare.

2. Defendants, their agents, servants, employees and representatives are enjoined from initiating any criminal proceedings against plaintiffs, their employees, representatives or agents, based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because it is within 1,000 feet of a church.

3. Defendants and their agents, servants, representatives and employees are enjoined from initiating any injunction proceedings against plaintiffs, their agents, servants, representatives or employees based upon the operation of their theater located at 7028 Greenleaf Avenue, Whittier, California, solely because the theater is within 1,000 feet of a church.

4. Defendants shall pay plaintifffs costs in the amount of $_____.

DATED: March 8, 1984.



MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX E

Law Offices
STANLEY FLEISHMAN
A Professional Corporation
2049 Century Park East, Suite 3160
Los Angeles, California 90067
(213) 551-2923

FILED
MAR 8 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

ENTERED
MAR - 9 1984
CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

WALNUT PROPERTIES, INC., a California corporation; and VINCENT MIRANDA, Plaintiffs, v. CITY OF WHITTIER, a Charter City, et al., Defendants.	No. 81-2262-R FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter duly came on for trial before the Honorable Manuel L. Real, Chief Judge, United States District Court for the Central District of California, Stanley Fleishman appearing for plaintiffs and Robert Flandrick appearing for defendants. The court having heard the evidence and being fully informed now makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is an action for declaratory and injunctive relief as follows:

A. Plaintiffs seek to obtain a judicial declaration that the City of Whittier's "Adult Business Ordinance", as it applies to a motion picture theater, is unconstitutional on its face, and as applied, violating the First and Fourteenth Amendments to the United States Constitution. Plaintiffs seek injunctive relief to prevent the defendants from enforcing the said ordinance against plaintiffs; and

B. Defendants by their counter-claims seek a judicial declaration that the ordinance is valid and subsisting.

2. The plaintiffs herein are Walnut Properties, Inc., a California corporation ("Walnut"), and Vincent Miranda, its President.

3. The defendants are City of Whittier, a Charter City; M. D. Klaxton, R. L. Henderson, L.A. Strong, Gene Chandler, V. A. Lopez, as members of the Whittier City Council; James Bale, as Chief of Police of the City of Whittier; and John Robert Flandrick as City Attorney of the City of Whittier.

4. Walnut is the owner of certain real property located at 7028 Greenleaf Avenue, Whittier, California, more particularly described as Lots 15, 16, and 17 of Block 20 of Whittier, in the City of Whittier, County of Los Angeles, State of California, as per map recorded in Book 21 at pages 55 and 56 of Miscellaneous Records, in the Office of the Recorder of the County of Los Angeles, (hereinafter "Property").

5. Walnut, an exhibitor of motion picture films, is engaged in an activity which is protected by the First and Fourteenth Amendments to the Federal Constitution, so long as the motion picture films are not obscene.

6. During May 1977, Walnut commenced to operate upon the Property a motion picture theater, exhibiting "Adult" films, as part of its chain of "PussyCat Theaters".

7. On June 22, 1977, the City enacted as an "urgency measure" Ordinance No. 2116 which had the purpose and effect of imposing certain limitations on "adult businesses".

8. On October 11, 1977, the City enacted as an "urgency measure" Ordinance No. 2121 reenacting, and readopting the terms and provisions of Ordinance No. 2116. On December 7, 1977, the City enacted as an "emergency measure" Ordinance No. 2128 which essentially continued in effect the provisions of Ordinance No. 2116, as it related to "adult businesses."

9. The emergency ordinances culminated in the enactment of Ordinance No. 2138 (hereinafter "first ordinance") on November 7, 1978. Except for its proximity to a church, Walnut's theater met all of the locational requirements of the first ordinance. The theater is located in the C-2 zone; is not within 500 feet of any lot classified in any of the R zones; is not within 1000 feet of any lot upon which there is located any public, private or parochial, elementary, Junior High, High School; is not within 1000 feet of any lot upon which there is located a city-owned, operated and maintained public park; is not within 1000 feet of any lot on which there is located another adult business; and is not within 500 feet of any lot on which there is located a business with a type-40-, 42-, 80-,and 61-on-sale alcohol beverage license.

10. Walnut Theatre is the only theater in Whittier exhibiting adult films, and it is within 1000 feet of a church. By reason of its proximity to a church, the City filed an action against Walnut pursuant to the first

ordinance seeking an injunction restraining Walnut from operating its theater, as an adult theater, at 7028 Greenleaf Avenue, Whittier, California, because of its closeness to a church. *City of Whittier v. Walnut Properties, Inc., et al.,* LASC No. SEC 29232.

11. The case was heard by the Honorable Vincent Dalsimer, Judge, Los Angeles Superior Court. On March 24, 1981, Judge Dalsimer filed Findings of Fact and Conclusions of Law holding that the first ordinance was unconstitutional on its face. He stated that the portion of the ordinance prohibiting an adult theater from locating within 500 feet of a "public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City. Judge Dalsimer concluded:

> "The absolute prohibition of an otherwise lawful business constitutes a violation of the state and Federal Constitutions and such ordinance is found to be void as applied to the defendant Walnut herein.
>
> "Walnut is entitled to a judgment dismissing the complaint against it."

12. On the same day Judge Dalsimer signed his Findings of Fact and Conclusions of Law the City passed and approved as an emergency ordinance, Ordinance No. 2257, the ordinance involved in this case. Basically, this second ordinance is the same as the first ordinance, except that it eliminates the prohibition of operating an adult theater within 500 feet of a "public facility which is utilized by minors." This second ordinance, like the first ordinance, prohibits an adult theater from operating within 1000 feet of a church.

13. On May 7, 1981, Walnut filed its complaint in this case alleging that unless restrained, the defendants

would initiate criminal proceedings against plaintiffs for operating an adult theater in a forbidden area and would seek injunctive relief requiring plaintiffs to discontinue exhibiting constitutionally protected film dealing with sex in their theater.

14. The City filed a Notice of Appeal on April 29, 1981 from Judge Dalsimer's ruling holding the first ordinance unconstitutional.

15. This court conducted a full trial prior to the time the appellate proceedings were concluded in the state court. A chronology of the events in the state appellate courts follows:

A. On February 1, 1983, the state Court of Appeal reversed the judgment of the Superior Court, holding that the trial court should have based its decision on the second ordinance, not on the first ordinance under which the complaint was filed. The Court of Appeal then held the second ordinance to be constitutional.

B. On February 15, 1983, in response to plaintiffs' Petition for Rehearing, the Court of Appeal modified its opinion and judgment and ordered the Superior Court to hold a hearing to determine whether plaintiffs' theater was an adult theater within the meaning of the ordinance. The court then denied the Petition for Rehearing.

C. On May 19, 1983, in response to plaintiffs' Petition for Hearing, the California Supreme Court granted the Petition and retransferred the matter to the Court of Appeal with directions to reconsider on remand its order in certain enumerated respects.

D. On December 8, 1983, the Court of Appeal rendered its second decision, stating in relevant part:

> "No evidence having been introduced on the crucial issue of the availability of other areas

> in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue."

The Court of Appeals reversed the judgment of the Superior Court, stating:

> "On remand, the trial court shall make the necessary rulings on proffered evidence to the status of the theater as an 'adult theater' and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

E. On February 2, 1984, the California Supreme Court denied plaintiffs' petition for hearing.

16. On February 13, 1984, this court held a hearing to consider events which occurred after the completion of the trial herein. After considering the events occurring in the state court and two recent decisions of the United States Court of Appeals for the Ninth Circuit (*Tovar, et al. v. Billmeyer,* 721 F.2d 1260 (9th Cir. 1983) and *Cinema Arts, Inc. v. County of Clark,* 722 F.2d 579 (9th Cir. 1983)) the court concluded that there was no reason why it should not render its decision herein.

17. The provision of the ordinance which prohibits an adult theater from operating within 1000 feet of a church is unconstitutional because the City failed to justify this prohibition. Prior to enacting the first ordinance, the City prepared a report dealing with the concentration of adult businesses and their effect upon immediately adjacent residential and commercial property. The report states that a "brief discussion with a representative of Whittier Presbyterian Church revealed that while the representative was very much aware of the presence of adult businesses, there was no

evidence of direct impact on the church." The report noted that churches are closed during the peak hours when adult businesses operate. Therefore, the report stated, the effect of an adult business on a church would naturally be less than on parks. The report stated:

> "[I]t may be in the community interest to require separation between adult businesses and parks. Five Hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas five hundred feet or under can be 'wandered into.' "

The report did not reveal sufficient justification for prohibiting an adult theater from operating within 1000 feet of a church, nor did the City present any evidence revealing that any such justification existed.

18. At trial, Elvin Porter, Director of Planning of the City of Whittier, sought to justify the separation, stating that "most churches are against the display of the human body. . . for anyone that wants to view the human body and acts." Displaying or viewing the human body in the nude is within the broad protection of the First Amendment. *Schad v. Borough of Mt. Ephraim,* 542 U.S. 61, 101 S.Ct. 2176 (1981). It thus appears that a motivating factor in the decision to prohibit an adult business from operating within 1000 feet of a church was to restrict plaintiffs' exercise of First Amendment rights.

19. Mr. Porter also justified the separation of an adult theater from a church by stating that their proximity created a "morals" conflict. It is settled that moral objections to First Amendment activities cannot justify

an ordinance impinging on freedom of expression. *Morris v. Municipal Court for San Jose-Milpitas Jud. Dist.*, 32 C.3d 553, 186 Cal.Rptr.494 (1982). Moreover prohibiting an adult theater, exhibiting constitutionally protected film, from operating within 1000 feet of a church raises substantial First Amendment questions concerning the separation of church and state. *See, Larkin v. Grendel's Den, Inc.*, ___ U.S. ___, 103 S.Ct.505 (1982).

Finally, the City has failed to meet its burden of proving that its decision to separate a church and an adult theater by 1000 feet furthers a compelling government interest unrelated to the suppression of free expression. The provision of the ordinance requiring a 1000-foot separation between an adult theater and a church makes it impossible to operate an adult theater in the central business district of Whittier because there is no location in that area which is not within 1000 feet of a church, school or park, or within 500 feet of an R- zone.

20. Since Walnut has the only theater in Whittier exhibiting adult films, its elimination would leave the City without any theaters showing such films, and the ordinance's effect would then be a total exclusion of adult theaters in the City of Whittier.

CONCLUSIONS OF LAW

1. The court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(3) (4), 2201, 2202, and pursuant to 42 U.S.C. § 1983.

2. Abstention is not appropriate in this case. *Cinema Arts, Inc. v. County of Clark*, 722 F.2d 279 (9th Cir. 1983).

3. The judgment of the state Court of Appeal, reversing the judgment of the Superior Court, has not resulted in a judgment on the merits, and *res judicata* is inapplicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church. Where, as here, plaintiffs preserve their right to have federal constitutional claims resolved in a federal court, the federal court must exercise the jurisdiction entrusted to it by the Constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. *See, Tovar v. Billmeyer,* 721 F.2d 1260, 1267 n. 8 (9th Cir. 1983).

4. Under the strict scrutiny standard, applicable to this case (*Tovar v. Billmeyer, supra,* 721 F.2d at 1264) Whittier's ordinance must be justified by a compelling state interest. The City has failed to meet its burden of proving that the provision of its zoning ordinance requiring a 1000-foot separation between a church and an adult theater furthers a compelling government interest unrelated to the suppression of free expression. The City has also failed to establish that its desire to prevent blighting and downgrading of commercial and residential areas adjacent to a concentration of adult businesses could not be accomplished without prohibiting an adult theater from operating within 1000 feet of a church. Indeed, the proximity of an adult theater to a church appears to be totally unrelated to the "blighting and downgrading" of commercial and residential areas adjacent to "concentrated" adult businesses. There is no sufficient factual basis for the City's decision to prohibit an adult theater from operating within 1000 feet of a church.

5. Because the City has failed to justify the provision of its ordinance prohibiting an adult theater from operating within 1000 feet of a church, and because a motivating factor in the City's establishing that prohibition was to restrict the exercise of First Amendment rights, that provision of Ordinance No. 2257 is unconstitutional, violating the Free Speech and Press provisions of the First and Fourteenth Amendments.

The Ninth Circuit has firmly established that:

> "zoning decisions may not constitutionally be made for the purpose of restricting protected First Amendment speech, including that which is sexually explicit. *See generally, Kuzinich v. County of Santa Clara,* 689 F.2d 1345, 1347 (9th Cir. 1982). Consequently, federal courts strictly scrutinize zoning decisions that impinge on First Amendment rights. *See generally, Young v. American Mini Theatres,* 427 U.S. 50, 56 and n. 12 (1976); *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968); *Ebel v. City of Corona,* 698 F.2d 390, 392 (9th Cir. 1983). *Cf. Harper and Virginia Board of Elections,* 383 U.S. 663, 670 (1966). Under the strict scrutiny standard, zoning decisions aimed at regulating unprotected activities that incidentally limit free expression are valid only if justified by a compelling state interest. *Young,* 427 U.S. at 56 n. 12; *Ebel,* 698 F.2d at 392."

Tovar v. Billmeyer, 721 F.2d at 1264.

In *Tovar,* the court stated (at 1265, 1266, 1267):

> "A zoning decision that has as a purpose the restriction of protected First Amendment activities cannot survive strict constitutional scrutiny. . . .

> "If a motivating reason for the Council's actions was to prevent the theater from operating then the zoning decision would violate the First Amendment. . . . Defendant's case will depend on proof that the zoning decisions were motivated by a desire to further a compelling governmental interest unrelated to the suppression of free expression. . . . '[T]he District Court should make factual findings on the validity of the City's assertion of harm [to be prevented by zoning] and then closely scrutinize the [zoning] ordinance's relationship to prevention of the alleged harm.'. . . [I]n order for defendants to prevail, the court must find that other actions [less restrictive] could not have prevented the harms involved. *Kuzinich,* 689 F.2d at 1348."

6. Plaintiffs are entitled to a judgment declaring that the ordinance herein is unconstitutional insofar as it prohibits an adult theater from operating within 1000 feet of a church. Plaintiffs are also entitled to an injunction restraining the defendants from initiating any criminal proceedings against plaintiffs or their employees, or from initiating any injunctive proceedings against plaintiffs or their employees based upon the operation of plaintiffs' theater within 1000 feet of a church.

7. The ordinance applies to plaintiffs because their theater is within 1000 feet of a church. By invalidating the provision of the ordinance applicable to plaintiffs, they will receive all the relief they need. The ordinance is otherwise constitutional.

8. Plaintiffs, as the prevailing parties in this action, are entitled to a reasonable attorney's fee pursuant to 42 U.S.C. § 1988.

9. Any Finding of Fact which is more appropriately a Conclusion of Law and any Conclusion of Law which is more appropriately a Finding of Fact shall be so deemed.

LET JUDGMENT ENTER ACCORDINGLY.

MAR 8 1984

MANUEL L. REAL

MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX F

CITY OF WHITTIER, Plaintiff and Appellant, v. WALNUT PROPERTIES, INC., Defendant and Respondent.

COUNSEL

Robert Flandrick, City Attorney, Williams & Sorensen and Virginia R. Pesola for Plaintiff and Appellant.

Stanley Fleishman for Defendant and Respondent.

OPINION

KINGSLEY, J.—This action was filed by City of Whittier to compel Walnut Properties, Inc., to comply with the city's zoning code that regulates "adult businesses.'

FACTS

On February 7, 1978, City of Whittier adopted an amendment to its zoning regulations by Ordinance No. 2138. The code established locational regulations applicable to "adult" business establishments within the city. The code declares "adult" businesses lawfully in existence prior to the effective date of the code to be legal nonconforming uses which are subject to abatement by administrative process.

Walnut owned and operated in the City of Whittier, as part of its "Pussycat" theatre chain, what is alleged to be an adult theatre.

Pursuant to section 9322(3) the superintendent of building and safety issued to Walnut an administrative order of abatement. Walnut appealed to the city planning commission and objected to the constitutionality of the code. The planning commission issued an order of abatement. Walnut appealed to the city council, which ordered the termination of the "adult theatre" use. Walnut failed to comply and the city sued for injunctive relief.

Walnut denied it was an "adult theatre" within the ordinance and alleged that the ordinance was uncon-

stitutional. We here determine only the issue of constitutionality. Walnut asked the court to take judicial notice of the fact that it had the only theatre in the city which allegedly is an "adult" theatre within the meaning of the ordinance.

The court found that language contained in section 9512, subdivision (2)(c) renders the code unconstitutional[1] in that the language prohibited the operation of any "adult business" at any location in the city. The court concluded as follows in conclusions (1) and (2):

"1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words 'other public facility which is utilized by minors,' has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase 'public facility' means, and includes, among other things, any retail commercial facility which is open to members of the

[1]Section 9512, subdivisions (1) and (2) of code reads in its entirety as follows:

"SECTION 9512—Special Regulations—All uses subject to the provisions of this part shall comply with all of the regulations contained in this chapter, and the following regulations: [¶] (1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and [¶] (2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located: [¶] (a) Is classified in Zone C-2 or a less restrictive zone; and [¶] (b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and [¶] (c) Is not within one thousand (1,000) feet of any lot upon which there is located a church, or educational institution, park or other public facility which is utilized by minors; and [¶] (d) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; and [¶] (e) Is not within five hundred (500) feet of any lot upon which is located a business with a type 40, 42, 48 or 61 onsale alcoholic beverage license. (Ord. No. 2138, & 2, 2-7-78.)"

public, and is utilized by minors, such as grocery stores and drug stores.

2. The absolute prohibition of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein."

Prior to the entry of judgment the city asked the court to take judicial notice of Ordinance No. 2254 which was enacted as an urgency measure on February 3, 1981. This was enacted in response to the trial court's proposed interpretation and to clarify any ambiguities. Sections 3, 4 and 5 of Ordinance No. 2254 read as follows:

"SECTION 3. Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1 *-ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

"(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 9 of this chapter; and

"(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

"(a) Is classified in Zone C-2 or a less restrictive zone; and

"(b) Is not within five hundred (500) feet of any lot classified in any of the R Zones; and

"(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

"(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

"(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

"(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

"(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license.'

"SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

"SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law."

The trial court did take judicial notice of the ordinance, but the court based its judgment on the language contained in the code prior to its amendment and gave no effect to Ordinance No. 2254.

I

Appellant first argues that the trial court judgment is erroneous because the court did not apply the law as it existed at the time of the judgment. On February 3, 1981, after the court announced its tentative decision, but prior to entry of judgment, the city council enacted Ordinance No. 2254 as an urgency measure to eliminate the interpretation of section 9512, subdivision (2)(c) that had been proposed by the trial court. Although the court granted the city's request for judicial notice, the court's findings of fact and conclusions of law relied on the language of section 9512, subdivision (2)(c) as that section was written prior to the enactment of Ordinance No. 2254, and did not take into account the language of Ordinance No. 2254.[2]

Respondent argues that since the city's complaint dealt with Ordinance No. 2138 and not Ordinance No. 2254, the question of whether No. 2254 is constitutional was not properly before the trial court. We agree. At the time the trial court gave judgment, consideration of the validity of Ordinance No. 2254 was not properly before the trial court. Section 3 of Ordinance No. 2254 provides that by its own terms it becomes operative only "if for any reason any of the special regulations set forth in Section 9512 [enacted by Ordinance No. 2138] hereof are declared invalid as applied to any such use." That was an event which had not occurred.

Nonetheless, inasmuch as we agree with the trial court that Ordinance No. 2138 is in fact unconstitutional on its face,[3] we reach the issue of the validity of the substitute

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[2]The amending Ordinance No. 2254 omitted the phrase "public facility."

[3]The effect of the ordinance is clearly to prohibit the operation of any "adult" business within the city limits. Such an absolute

ordinance (No. 2254). By this decision, Ordinance No. 2254 will become operative. It is settled law that the rights of the parties in an action in equity will be determined on the basis of the law as it exists at the time of the determination, rather than at the time the complaint was filed, and this rule applies to judgments on appeal as well as to judgments in the trial court. (*City & County of S.F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955, 294 P.2d 503].) The version of the ordinance in force at the present is the relevant legislation for the purpose of the appeal. It is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302].)

II

Under the substitute ordinance, the only restrictions on the location of an adult theatre in the city would be that it be in a C-2 or less restrictive zone, not be within 500 feet of a residential zone, or within 1,000 feet of a church, educational institution, park or other adult business.

In *Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d. 310, 321, 96 S.Ct. 2440], the court held that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating the ordinance. A zoning ordinance was not held invalid

exclusion is violative of First Amendment rights. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61, 75 [68 L.Ed.2d 671, 684, 101 S.Ct. 2176].)

merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposed a minimal burden on protected speech. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61 at P. 71 [68 L.Ed.2d 671 at p. 682], analyzing *Young v. American Mini Theatres.*) A zoning law which is alleged to threaten First Amendment rights is subject to close scrutiny to pass constitutional muster and the zoning law affecting the location of adult theatres and bookstores is valid only so long as the zoning law does not have the effect of significantly reducing the numbers and availability to the public. (*Alexander v. City of Minneapolis* (D. Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions must not only serve significant state interests but must leave open adequate alternative channels of communication. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 76 [68 L.Ed.2d 671, 685].) In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, the zoning ordinance significantly curtailed the public's access to adult books and films and there would not have been a single location in the city for opening of new theatres and bookstores; therefore the Minneapolis zoning ordinance was unconstitutional and went beyond the mere locational restrictions. In *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d 671, 684], the borough excluded all live entertainment and there was no evidence in the record to support the proposition that the kind of entertainment appellants wished to provide was available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982)

682 F.2d 1203, the zoning ordinance was not reasonable as to time, place and manner where the ordinance banned adult theatres outright from much of the city, few access roads led to permitted locations, and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theatres outright from much of the city by putting them at a greater distance. (682 F.2d 1203, 1214.)

In the case at bench, the zoning ordinance, No. 2254, is reasonable as to time, place and manner if it leaves open alternative channels of communication to the speaker and does not violate the First Amendment. *American Mini Theatres* rejected the notion that dispersal requirements alone muzzle protected speech. (*Basiardanes v. City of Galveston, supra,* 682 F.2d 1203.) If the ordinance merely requires relocation within Whittier and does not ban an adult theatre use, then it will not violate the First Amendment.

In the case at bench, the parties filed a "Stipulation" concerning proffered testimony on the subject of the availability of alternate site for the theatre. The stipulation, among other things, recited that Shawn F. Campell, a named defendant in consolidated action No. SEC 29231, ". . . if sworn as a witness should testify, subject to objection hereinafter stated, as follows: . . ." It then went on to state his proposed testimony.

The stipulation then went on to provide:

"7. That Plaintiff objects, on grounds of relevancy, to the testimony offered in Section 6(a), (b) and (c) of this Stipulation; and

"8. That if the objection above were to be overruled, Plaintiff would call as a witness Elvin H. Porter, who would testify under oath, as follows:

"(a) That he has been the Planning Director of the City of Whittier for over fifteen (15) years; and

"(b) That he is fully familiar with the City's Zoning Regulations and the Zoning Map included therein, and that in his opinion, there are other locations within the boundaries of the City of Whittier, on commercially and industrially zoned properties, where 'adult businesses,' defined as such in the said Zoning Regulations, could be located; . . ."

The stipulation thus provided that city would call Elvin H. Porter as a witness only "if the objection above [on the ground of relevancy] were to be overruled."

That objection was never overruled. In fact, the record on appeal reveals no ruling as to it.

No evidence having been introduced on the crucial issue of the availability of other areas in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue. If the ordinance herein merely disperses adult theatres as in *Young v. American Mini Theatres, supra,* 427 U.S. 50 and does not prevent the entry of new theatres into the market place, (see *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162), the ordinance is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner.

III

Respondent argues that the term "adult theatre" is unconstitutionally vague and overbroad. While the term "adult theatre" may be ambiguous in ordinary English usage, it has become part of the American vernacular. Secondly, and more important, the term "adult theatre" is very specifically defined within the ordinance itself, and Whittier's definition of adult theatre is very similar

to the use of the term which was found constitutional in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 155 [171 Cal.Rptr. 251]. Although the *Pringle* court found the ordinance before it to contain some vague language, the *Pringle* court found itself compelled under the decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330, 599 P.2d 636] to construe the language narrowly in order to preserve its validity.

More recently in *Kuhns v. Board of Superivsors* (1982) 128 Cal.App.3d 369, 375 [181 Cal.Rptr. 1], the court also accepted a narrow interpretation of statutory language. The term "adult theatre" has been used frequently by the courts to describe a specific kind of entertainment, and the term is neither vague nor overbroad.

IV

Respondent argues that the city failed to prove that Walnut was an "adult theatre" within the meaning of the ordinance. Respondent asserts that the record fails to reveal that a preponderance of the films shown at Walnut's theatre have as their dominant theme the depiction of the ordinance's enumerated sexual activities, in accord with the test set forth in *Pringle v. City of Covina, supra,* 115 Cal.App.3d 151 at page 162.

At the hearing before the city council, Lieutenant Marino testified that he made periodic inspections of the movies at the Walnut theatre, and those movies depicted various acts from which the city council could have concluded that the movies were "adult movies" within the legal meaning of that term.

We can find, in the record before us, no evidence contradictory of the lieutenant's testimony or any attack on his standing as an expert on the subject of "adult

movies." Respondent, represented by experienced counsel, made no effort to attack the lieutenant's testimony, either before the city council or in the trial court. It agreed to submit the case on the record. However, as with the issue of alternative sites, the trial court made no finding on the issue of the character of respondent's theatre. On the record the only finding could be adverse to respondent, but it is entitled to have one made. On remand, the trial court shall make the required finding.

V

Respondent argues that the ordinance is unconstitutional because prior to establishing or conducting an adult theatre, a conditional use permit must be required. The case at bar involves the abatement of a nonconforming use and does not deal with the issuance or denail of a conditional use permit.

VI

Respondent argues that the 120-day amortization period is unreasonable on its face. Zoning ordinances may validly provide for eventual termination of nonconforming property uses without compensation if the ordinance provides for a reasonable amortization period. The party complaining of the zoning legislation has the burden of establishing the unreasonableness of the amortization period and must provide evidence showing the particular period is unreasonable as to him. (*Castner v. City of Oakland* (1982) 129 Cal.App.3d 94 [180 Cal.Rptr. 682].) In the case at bench, respondent has cited us no evidence showing the unreasonableness of the amortization period. While we may agree that 120 days appears to be a very short period of time for respondent to reorganize its operation, we are not in

a position to decide that here. Respondent had the burden of showing that the amortization period was unreasonably short as to it, and did not fulfill its burden.

VII

Respondent argues that the ordinance violates the establishment clause of the First Amendment in requiring an adult theatre to be 1,000 feet from a church, it indorses a religion. Requiring an adult theatre to be 1,000 [feet] from a church does not establish a religion. The prohibition against establishing a religion means the government cannot force or influence a person to go to or remain away from a church (*Everson v. Board of Education* (1964) 330 U.S. 1 [91 L.Ed. 711, 67 S.Ct. 504, 168 A.L.R. 1392]) and the government must remain neutral in matters of religion. In the case at bar, the zoning ordinance herein does not have an impermissible religious purpose and the effect of requiring the adult theatre to move 1,000 feet from a church does not either encourage people to go to church nor discourage people from going to chuch. We cannot say the government has failed to remain neutral in matters of religion. The existence of an adult theatre within 1,000 feet of a church may well affect the sensibilities of some persons who attend a church, but we cannot agree that it will cause a person to go to church or that it will in any way advance a religion. Ordinances with similar locational requirements have been held valid, and we need not unduly lengthen this opinion by discussing those cases further.

The judgment is reversed. On remand, the trial court shall make the necessary rulings on proffered evidence as to the status of the theatre as an "adult theatre" and as to the availability of alternate sites in the City of Whittier, and enter judgment in accordance with this

opinion and such additional findings. Neither party shall recover costs in this court.

Woods, P. J., concurred.

McCLOSKY, J. —I dissent:

I

I agree with the majority that "[i]t is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court." (Majority opn., *ante*, p. —; *Kash Enterprises, Inc. v. City of Los Angeles*, (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302]; see also *City & County of S. F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955] and *Complete Serv. Bur. v. San Diego County Med. Soc.* (1954) 43 Cal.2d 201, 207 [272 P.2d 497].) From that valid principle of law, the majority concludes that we should decide this case on the basis of Ordinance No. 2254. Based upon the fact that Ordinance No. 2254 is *not* the current law, I disagree with that conclusion.

Ordinance No. 2254 was enacted as an urgency measure on February 3, 1981, in response to the trial court's *proposed* interpretation of the original Ordinance No. 2138 (9512, subd. (2)(c)). As the majority notes, the trial court took judicial notice of Ordinance No. 2254, but based its later judgment on the language contained in the origianl Ordinance No. 2138 prior to the enactment of No. 2254.

It is my view that in so doing the trial court was correct. At the time it gave judgment, consideration of the validity of Ordinance No. 2254 was not properly before the trial court and I do not believe that it is

properly before us now. Section 3 of Ordinance No. 2254 provides as follows:

"SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section *shall apply* to all uses which are subject to the provisions of this part *if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.*" (Italics added.)

At the time the trial court gave its judgment, there was no final judgment or judgment on appeal declaring any of the provisions of section 9512 of Ordinance No. 2138 invalid. The record on appeal reflects no change in that situation to this date. That being so, there was no way the trial court could have properly considered the constitutionality of the provision of Ordinance No. 2254, nor by which we may properly do so now. That ordinance, by its own terms, becomes operative *only* "if for any reason any of the special regulations set forth in Section 5912 [enacted by Ordinance No. 2138] hereof are declared invalid as applied to any such use." That was an event which had not, and to this day has not, occurred.

It is one thing to hold, as *Kash Enterprises* quite properly does, that the relevant law is that which exists at the time of the judgment on appeal. It is quite a different, and in my view an impermissible thing for the majority to hold that it will "reach the issue of the validity of the substitute ordinance (No. 2254)" because "[b]y this decision, Ordinance No. 2254 will become operative." That is a premature leap I am unwilling to take. The flaw in the majority's conclusion is that there is no existing final judgment on appeal declaring the

original Ordinance No. 2138 invalid. (See majority opn., *ante*, p. 640.) Assuming no petition for hearing is filed with the Supreme Court, the earliest the majority's decision could become final—and thus operative—would be 30 days after its filing. There is thus no judgment on appeal that is final or operative now.

II

We are directed by the Supreme Court's order of May 19, 1983, retransferring this matter to us, to reconsider our previous order which precluded "further proceedings to resolve the factual issue posed by paragraphs 6(a) and 8 of the Stipulation of Facts filed November 13, 1979, included at p. 196 of the Clerk's Transcript."

Paragraph 6 of that stipulation, among other things, recited that Shawn F. Campbell, a named defendant in consolidated action No. SEC 29231, ". . . if sworn as a witness should testify, subject to objection hereinafter stated, as follows: . . ."

After stating his proposed testimony, the stipulation then went on to provide:

"7. That Plaintiff objects, on grounds of relevancy, to the testimony offered in Section 6(a), (b) and (c) of this Stipulation; and

"8. That if the objection above were to be overruled, Plaintiff would call as a witness Elvin H. Porter, who would testify under oath, as follows:

"(a) That he has been the Planning Director of the City of Whittier for over fifteen (15) years; and

"(b) That he is fully familiar with the City's Zoning Regulations and the Zoning Map included therein, and that in his opinion, there are other locations within the boundaries of the City of Whittier, on commercially and

industrially zoned properties, where 'adult businesses,' defined as such in the said Zoning Regulations, could be located; . . ."

The stipulation thus provided that city would call Elvin H. Porter as a witness *only* "if the objection above [on the ground of relevancy] were to be overruled." It never was. In fact, as the majority concedes, the record on appeal reveals no ruling as to it. It accordingly follows that, having wavied such ruling below, city may not now rely on the testimony of Elvin H. Porter that it offered only on the non-occurring condition that its objection to Shawn F. Campbell's testimony was overruled. That left the record devoid of any evidence whatsoever to support city's position in regard to location.

I fully agree that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating an ordinance. A zoning ordinance is not invalid merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposes a *minimal* burden on the protected speech. (*Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d 310, 321-322, 96 S.Ct. 2440]; see also *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 71 [68 L.Ed.2d 671, 682].) A zoning law which is alleged to threaten First Amendment rights is, however, subject to close scrutiny to pass constitutional muster. Such zoning law affected the location of adult theatres and bookstores is valid only so long as it does not have the effect of significantly reducing the numbers of such businesses and their availability to the public. (*Alexander v. City of Minneapolis* (D.Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, the courts must weigh heavily the facts and the communication involved. To be reasonable, the regulation must be narrowly tailored to further the state's legitimate interest and the regulation's time, place and manner restrictions not only must serve significant state interests but must leave open adequate alternative channels of communicaiton. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61, 76 [68 L.Ed.2d 671, 685, 101 S.Ct. 2176].) In *Schad,* the borough excluded all live adult entertainment and there was no evidence in the record to support the proposition that that kind of entertainment was available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982) 682 F.2d 1203, the zoning ordinance was held not reasonable as to time, place and manner where the ordinance banned adult theatres outright from much of the city, few access roads led to permitted locations and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theatres outright from much of the city by putting them at a great distances. (682 F.2d at p. 1214.)

In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, where the zoning ordinance significantly curtailed the public's access to adult books and films as there would not have been a single location in the city for opening of new theatres and bookstores, the court declared the city's zoning ordinance unconstitutional as going beyond mere locational restrictions.

III

As Walnut's claims are grounded in the First Amendment, city has the burden of overcoming the presumption that the ordinance is invalid because it impinges on freedom of expression. (*Schad v. Mount*

Ephraim, supra, 452 U.S. 61.) The zoning ordinance must be narrowly drawn to further a sufficiently substantial government interest, and unless the ordinance advances significant governmental interests and accomplishes such advancement without undue restraint of speech, the ordinance is invalid. The city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance. (*Avalon Cinema Corp. v. Thompson,* (8th Cir. 1981) 667 F.2d 659, 661.) The record on appeal in this matter before us fails to support the conclusion that the city sustained its burden of overcoming the presumption of invalidity by proving that the ordinance in question was narrowly drawn, that it advanced a significant governmental interest without undue restraint of speech and that the state interest in fact or that the factual basis was considered by the city in passing the ordinance.

The majority, relying on *County of Sacramento v. Superior Court* (1982) 137 Cal.App.3d 448, 454-455 [187 Cal.Rptr. 154], holds that identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it since lawmakers in one locale should not be denied the benefit of the wisdom and experience of lawmakers in another community. From that premise, they conclude that since sociologists and urban planners have testified that a concentration of adult movie theatres in limited areas lead to the deterioration of surrounding neighborhoods (see *Young v. American Mini Theatres, supra,* 427 U.S. 50, 80 [49 L.Ed.2d 310, 332]), City need not bring its own sociologists to apply these observations to the City of Whittier. (See also *Strand Property Corp. v. Municipal Court* (1983) 148 Cal.App.3d 882 — Cal.Rptr. —]).

In my view, we need not decide that question since the necesary factual premise for it is wholly lacking in the case before us. Far from there being any evidence that there was any concentration of adult movie theatres in any part of the City of Whittier or any possibility that there would be any, there was no evidence presented to the trial court that there was more than the one threatre operated by the respondent.

I conclude that the only current existing and operative ordinance was the original Ordinance No. 2138. I agree with the majority that that ordinance is unconstitutional. Moreover I find no competent evidence in the record to support the city's position that there were other available commercially or industrially zoned locations within the city where an adult business of the nature of respondent's could be located.

I therefore see no basis in law or equity for a reversal or for a further remand to the trial court.

I would affirm the judgment.

APPENDIX G

2 - 4 Civil No. 65777

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

SUPREME COURT
FILED
MAY 10 1983
LAURENCE P. GILL, Clerk
Deputy

CITY OF WHITTIER

v.

WALNUT PROPERTIES, INC.

Petition for hearing GRANTED. The cause is transferred to this court and retransferred to the Court of Appeal, Second District, Division Four, with directions to reconsider on remand its order, which now precludes further proceedings to resolve the factual issue posed by paragraphs 6(a) and 8 of the Stipulation of Facts filed November 13, 1979, included at p. 196 of the Clerk's Transcript. (See Schroeder v. S.L.T.V.G., 60 Cal. 467, 471-472.)

Chief Justice

Justice

Justice

Justice

APPENDIX H

CITY OF WHITTIER, Plaintiff and Appellant, v. WALNUT PROPERTIES, INC., Defendant and Respondent.

[Civ. No. 65777. Second Dist., Div. Four. Feb. 1, 1983.]

[As modified Feb. 15, 1983.]

COUNSEL

Robert Flandrick, City Attorney, Burke, Williams & Sorensen and Virginia R. Pesola for Plaintiff and Appellant.

Stanley Fleishman for Defendant and Respondent.

OPINION

KINGSLEY, J.—This action was filed by City of Whittier to compel Walnut Properties, Inc. to comply with the city's zoning code that regulates "adult businesses."

FACTS

On February 7, 1978, City of Whittier adopted an amendment to its zoning regulations by ordinance No. 2138. The code established locational regulations applicable to adult business establishments within the city. The code declares adult businesses lawfully in existence prior to the effective date of the code to be legal nonconforming uses which are subject to abatement by administrative process.

Walnut owned and operated in the City of Whittier, as part of its "Pussycat" theater chain, what is alleged to be an adult theater.

Pursuant to section 9322, subdivision (3) the superintendent of building and safety issued to Walnut an administrative order of abatement. Walnut appealed

to the city planning commission and objected to the constitutionality of the code. The planning commission issued an order of abatement. Walnut appealed to the city council, which ordered the termination of the "adult theater" use. Walnut failed to comply and the city sued for injunctive relief.

Walnut denied it was an "adult theater" within the ordinance and alleged that the ordinance was unconstitutional. We here determine only the issue of constitutionality. Walnut asked the court to take judicial notice of the fact that it had the only theater in the city which allegedly is an adult theater within the meaning of the ordinance.

The court found that language contained in section 9512, subdivision (2)(c) renders the code unconstitutional[1] in that the langauge prohibited the operation of any "adult business" at any location in the city. The court concluded as follows in conclusions (1) and (2):

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[1]Section 9512, subdivisions (1) and (2) of the code reads in its entirety as follows:

"SECTION 9512—Special Regulations—All uses subject to the provisions of this part shall comply with all of the regulations contained in this chapter, and the following regulations:

"(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and

"(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

"(a) Is classified in Zone C-2 or a less restrictive zone; and

"(b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and

"(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church, or educational institution, park or other public facility which is utilized by minors; and

"1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words 'other public facility which is utilized by minors,' has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase 'public facility' means, and includes, among other things, any retail commercial facility which is open to members of the public, and is utilized by minors, such as grocery stores and drug stores.

"2. The absolute prohibition of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein."

Prior to the entry of judgment the city asked the court to take judicial notice of ordinance No. 2254 which was enacted as an urgency measure on February 3, 1981. This was enacted in response to the trial court's proposed interpretation and to clarify any ambiguities. Sections 3, 4, and 5 of ordinance No. 2254 read as follows:

"SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

" '9512.1—ALTERNATE SPECIAL REGULATIONS. The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

" '(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall

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"(d) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; and

"(e) Is not within five hundred (500) feet of any lot upon which is located a business with a type 40, 42, 48 or 61 on-sale alcoholic beverage license. (Ord. No. 2138, § 2, 2-7-78.)"

be obtained, pursuant to the provisions of Part 9 of this chapter; and

" '(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

" '(a) Is classified in Zone C-2 or a less restrictive zone; and

" '(b) Is not within five hundred (500) feet of any lot classified in any of the R zones; and

" '(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

" '(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

" '(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

" '(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

" '(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license.'

"SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

"SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law."

The trial court did take judicial notice of the ordinance, but the court based its judgment on the language contained in the code prior to its amendment and gave no effect to ordinance No. 2254.

Appellant first argues that the trial court's judgment is erroneous because the court did not apply the law as it existed at the time of judgment. On February 3, 1981, after the court announced its tentative decision, but prior to entry of judgment, the city council enacted ordinance No. 2254 as an urgency measure to eliminate the interpretation of section 9512, subdivision (2)(c) that had been proposed by the trial court. Although the court granted the city's request for judicial notice, the court's findings of fact and conclusions of law relied on the language of section 9512, subdivision (2)(c) as that section was written prior to the enactment of ordinance No. 2254, and did not take into account the language of ordinance No. 2254.[2] Therefore, the appellant is correct that the court did not apply the law as it existed at the time of judgment. The question before us is whether the court was required to consider ordinance No. 2254, considering that the ordinance under which the city filed its complaint for injunctive relief was ordinance No. 2138.

Respondent argues that since the city's complaint dealt with ordinance No. 2138 and not ordinance No. 2254, the question before this court is solely whether ordinance No. 2138 is constitutional, and the question of whether No. 2254 is constitutional was not properly before the

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[2]The amending ordinance No. 2254 omitted the phrase "public facility."

trial court. We do not agree. It is settled law that the rights of the parties in an action in equity will be determined on the basis of the law as it exists at the time of the determination, rather than at the time the complaint was filed, and this rule applies to judgments on appeal as well as to judgments in the trial court. (*City & County of S. F. v. Budde* (1956) 139 Cal.App.2d 10, 12 [292 P.2d 955, 294 P.2d 503].) The version of the ordinance in force at the present is the relevant legislation for the purposes of the appeal. It is an established rule of law that on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 306, fn. 6 [138 Cal.Rptr. 53, 562 P.2d 1302].) Repeal or modification of an ordinance under attack, or subsequent legislation may render moot the issues in a pending appeal. By rule of law on appeals from judgments granting or denying injunctions, the law to be applied is that which is current at the time of judgment in the appellate court. (*Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13, 18 [81 Cal.Rptr. 440].) Thus the trial court erroneously failed to consider ordinance No. 2254, and the language "other public facility" from ordinance No. 9512, subdivision (2)(c) is not relevant in determining the constitutionality of the ordinance, either here or in the trial court.

Thus, the only restrictions on the location of an adult theater in the city would be that it be in a C-2 or less restrictive zone, not be within 500 feet of a residential zone, or within 1,000 feet of a church, educational institution, park or other adult business.

In *Young v. American Mini Theatres* (1976) 427 U.S. 50, 62, 63 [49 L.Ed.2d 310, 321, 322, 96 S.Ct. 2440]

the court held that the mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not sufficient reason for invalidating the ordinance. A zoning ordinance was not held invalid merely because it regulates activity protected under the First Amendment, where the challenged restriction on the location of adult movies imposed a minimal burden on protected speech. (*Schad v. Mount Ephraim* (1981) 452 U.S. 61 at p. 71 [68 L.Ed.2d 671 at pp. 681-682, 101 S.Ct. 2176], analyzing *Young v. American Mini Theatres.)* A zoning law which is alleged to threaten First Amendment rights is subject to close scrutiny to pass constitutional muster and the zoning law affecting the location of adult theaters and bookstores is valid only so long as the zoning law does not have the effect of significantly reducing the numbers and availability to the public. (*Alexander v. City of Minneapolis* (D.Minn. 1982) 531 F.Supp. 1162, 1170.)

In assessing the reasonableness of a regulation, we must weigh heavily the facts and the communication involved; the regulation must be narrowly tailored to further the state's legitimate interest. To be reasonable, time, place and manner restrictions not only must serve significant state interests but must leave open adequate alternative channels of communication. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 76 [68 L.Ed.2d 671, 685].) In *Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162, the zoning ordinance significantly curtailed the public's access to adult books and films and there would not have been a single location in the city for opening of new theaters and bookstores; therefore the Minneapolis zoning ordinance was unconstitutional and went beyond the mere locational restrictions. In *Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d

671, 684], the borough excluded all live entertainment and there was no evidence in the record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. In *Basiardanes v. City of Galveston* (5th Cir. 1982) 682 F.2d 1203, the zoning ordinance was not reasonable as to time, place and manner where the ordinance banned adult theaters outright from much of the city, few access roads led to permitted locations and the permissible locations were in undeveloped areas near warehouses and swamps. Galveston's law suppressed speech because it banned adult theaters outright from much of the city by putting them at a great distance. (682 F.2d 1203, 1214.)

In the case at bench the zoning ordinance, No. 2254, is reasonable as to time, place and manner because it leaves open alternative channels of communication to the speaker and does not violate the First Amendment. *American Mini Theatres* rejected the notion that dispersal requirements alone muzzle protected speech; *Basiardanes v. City of Galveston, supra,* 682 F.2d 1203, and [both] ordinance No. 2254 [and No. 2138] merely require relocation within Whittier and do not ban an adult theater use. In the case at bench there was a stipulation that the director of city planning would have testified as to other locations available to Walnut Theatres. Although it is true that there was no other evidence that there are adult theaters presently within Whittier, and such a fact has been considered significant in *Avalon Cinema Corp. v. Thompson* (8th Cir. 1981) 667 F.2d 659,[3] this is not a case where the city has effectively excluded all of the type of adult entertainment

[3]Since Walnut can relocate and other new adult theaters can locate within the city, we do not find the fact that there are presently no other adult theaters in Whittier to be determinative.

which appellant seeks to sell. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61, 75 [68 L.Ed.2d 671, 684].) According to the inferences properly drawn from the stipulation to testimony, Walnut could relocate within the city, and thus this is not a case where free speech is suppressed by either banning adult theaters outright from much of the city or by putting these theaters at a great distance. (*Basiardanes v. City of Galveston, supra,* 682 F.2d 1203.) Since the ordinance herein merely disperses adult theaters as in *Young v. American Mini Theatres, supra,* 427 U.S. 50 and does not prevent the entry of new theaters into the marketplace, (*see Alexander v. City of Minneapolis, supra,* 531 F.Supp. 1162), the ordinance is not unconstitutional as applied, and is a reasonable restriction as to time, place and manner. We find that the ordinance passes constitutional muster as not being unduly restrictive, since Walnut (and other new adult theaters) can locate at other places within the city.

Respondent argues that the city cannot rely on *Young v. American Mini Theatres, supra,* 427 U.S. 50 to save the ordinance, because in the instant case it will be "virtually impossible" to establish an adult theater in the City of Whittier. As we have stated before, the parties stipulated that the director of planning would testify that there were locations in the city where Walnut could locate, if the ordinance is interpreted in the way we have suggested here.

Respondent argues correctly, that since Walnut's claims are rooted in the First Amendment, the city has the burden of overcoming the presumption that the ordinance is invalid because it impinges on freedom of expression. (*Schad v. Mount Ephraim, supra,* 452 U.S. 61.) The zoning ordinance must be narrowly drawn to further a sufficiently substantial government interest,

and unless the ordinance advances significant governmental interests and accomplishes such advancement without undue restraint of speech, the ordinance is invalid. The city must buttress its assertion with evidence that the state interest has a basis in fact and that the factual basis was considered by the city in passing the ordinance. (*Avalon Cinema Corp. v. Thompson, supra,* 667 F.2d 659, 661.) However, identical ordinances need not be tested anew each time they are enacted by a different governmental entity by establishing the actual existence of local conditions which would justify it ". . . lawmakers in one locale [should not be denied] the benefit of the wisdom and experience of lawmakers in another community, no matter how similar the circumstances; . . ." (See *County of Sacramento v. Superior Court (Goldies Bookstores, Inc.)* (1982) 137 Cal.App.3d 448, 454, 455 [187 Cal.Rptr. 154].) The "factual basis" behind certain types of zoning laws, insofar as those zoning laws require dispersal or deconcentration, has been developed by testimony in other cases. Sociologists and urban planners have testified that a concentration of adult movie theaters in limited areas leads to the deterioration of surrounding neighborhoods. (See *Young v. American Mini Theatres, supra,* 427 U.S. 50 at p. 80 [49 L.Ed.2d 310 at pp. 331-332].) This testimony is sufficient and the city need not bring their own sociologists to apply these observations to the City of Whittier.

However, two other tests remain. The regulations must be motivated not by a distaste for the speech itself, but by a desire to eliminate its adverse effects and the legislation may not severely restrict First Amendment rights. (91 Harv.L.Rev. 1427, 1558-1559.) In view of the fact that the ordinance merely would have the effect of scattering or relocating adult theaters in the City of

Whittier, and would not ban that form of entertainment, either absolutely or pragmatically, the zoning regulation neither unduly restricts First Amendment rights nor can it fairly be considered to be motivated by a distaste for the speech itself. It appears that the ordinances in question were motivated by an attempt to reduce neighborhood blight and not by a distaste for the speech. Appellant has sustained its burden of proof.

Respondent argues that the term "adult theater" is unconstitutionally vague and overbroad. While the term "adult theater" may be ambiguous in ordinary English usage, it has become part of the American vernacular. Secondly, and more important, the term "adult theater" is very specifically defined within the ordinance itself, and Whittier's definition of adult theater is very similar to the use of the term which was found constitutional in *Pringle v. City of Covina* (1981) 115 Cal.App.3d 151, 155 [171 Cal.Rptr. 251]. Although the *Pringle* court found the ordinance before it to contain some vague language, the *Pringle* court found itself compelled under the decision in *Pryor v. Municipal Court* (1979) 25 Cal.3d 238 [158 Cal.Rptr. 330, 599 P.2d 636] to construe the language narrowly in order to preserve its validity.

More recently in *Kuhns v. Board of Supervisors* (1982) 128 Cal.App.3d 369, 375 [181 Cal.Rptr. 1], the court also accepted a narrow interpretation of statutory language. The term "adult theater" has been used frequently by the courts to describe a specific kind of entertainment, and the term is neither vague nor overbroad.

Respondent argues that the city failed to prove that Walnut was an "adult theater" within the meaning of the ordinance. Respondent asserts that the record fails to reveal that a preponderance of the films shown at

Walnut's theater have as their dominant theme the depiction of the ordinance's enumerated sexual activities, in accord with the test set forth in *Pringle v. City of Covina, supra,* 115 Cal.App.3d 151 at page 162.

At the hearing before the city council, Lieutenant Marino testified that he made periodic inspections of the movies at the Walnut theater, and these movies depicted various acts from which the city council could have concluded that the movies were "adult movies" within the legal meaning of that term.

Respondent argues that the ordinance is unconstitutional because prior to establishing or conducting an adult theater, a conditional use permit must be required. The case at bar involves the abatement of a nonconforming use and does not deal with the issuance or denial of a conditional use permit.

Respondent argues that the 120-day amortization period is unreasonble on its face. Zoning ordinances may validly provide for eventual termination of nonconforming property uses without compensation if the ordinance provides for a reasonable amortization period. The party complaining of the zoning legislation has the burden of establishing the unreasonableness of the amortization period and must provide evidence showing the particular period is unreasonable as to him. (*Castner v. City of Oakland* (1982) 129 Cal.App.3d 94 [180 Cal.Rptr. 682].) In the case at bench respondent has cited us no evidence showing the unreasonableness of the amortization period. While we may agree that 120 days appears to be a very short period of time for respondent to reorganize its operation, we are not in a position to decide that here. Respondent had the burden of showing that the amortization period was unreasonably short as to it, and it did not fulfill its burden.

Respondent argues that the ordinance violates the establishment clause of the First Amendment in that requiring an adult theater to be 1,000 feet from a church endorses a religion. Requiring an adult theater to be 1,000 feet from a church does not establish a religion. The prohibition against establishing a religion means the government cannot force or influence a person to go to or remain away from a church (*Everson v. Board of Education* (1947) 330 U.S. 1, 15 [91 L.Ed. 711, 723, 67 S.Ct. 504, 511]), and the government must remain neutral in matters of religion. In the case at bar, the zoning ordinance herein does not have an impermissible religious purpose and the effect of requiring the adult theater to move 1,000 feet from a church does not either encourage people to go to church nor discourage people from going to church. We cannot say the government has failed to remain neutral in matters of religion. The existence of an adult theater within 1,000 feet of a church may well effect the sensibilities of some persons who attend a church, but we cannot agree that it will cause a person to go to church or that it will in any way advance a religion. Ordinances with similar locational requirements have been held valid, and we need not unduly lengthen this opinion by discussing those cases further.

The judgment is reversed. The case is remanded for such further proceedings as may be necessary to determine the issue of whether the theater in question is, in fact, an "adult" theater within the meaning of the ordinance now involved.

Woods, P.J., and McClosky, J., concurred.

APPENDIX I

LAW OFFICES
STANLEY FLEISHMAN
A PROFESSIONAL CORPORATION
433 NORTH CAMDEN DRIVE, SUITE 900
BEVERLY HILLS, CALIFORNIA 90210
(213) 550-7460

Attorney for Defendant
WALNUT PROPERTIES, INC.

ENTERED FILED

APR 1 1981

MAR 24 1981

JOHN J. CORCORAN, COUNTY CLERK
BOOK SE C 29 PAGE 205

JOHN J. [illegible], COUNTY CLERK
BY L. COLEMAN, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF WHITTIER, a Charter City, Plaintiff, vs. WALNUT PROPERTIES, INC., and DOES I through XX, inclusive, Defendants.	NO. SE C 29232 JUDGMENT

The Court having signed the Findings of Fact and Conclusions of Law herein.

IT IS ORDERED that the complaint against Walnut Properties, Inc. is dismissed with cost to Walnut Properties, Inc.

DATED: March 24, 1981

VINCENT S. DALSIMER, JUDGE
LOS ANGELES SUPERIOR COURT

APPENDIX J

LAW OFFICES
STANLEY FLEISHMAN
A PROFESSIONAL CORPORATION
433 NORTH CAMDEN DRIVE, SUITE 900
BEVERLY HILLS, CALIFORNIA 90210
(213) 550-7460

RECD SF
MAR 5 - 1981

FILED
MAR 24 1981
JOHN A. [illegible], COUNTY CLERK
BY L. COLEMAN, DEPUTY

Attorney for Defendant
WALNUT PROPERTIES, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CITY OF WHITTIER, a Charter City, Plaintiff, vs. WALNUT PROPERTIES, INC., and DOES I through XX, inclusive, Defendants.	NO. SE C 29232 FINDINGS OF FACT AND CONCLUSIONS OF LAW DEPT A

The case was heard on January 28, 1981 by the Honorable Vincent S. Dalsimer, Robert Flanderick appearing for the plaintiff, and Stanley Fleishman appearing for the defendant Walnut Properties, Inc. The Court, having heard the parties, and considered all the papers on file, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff, City of Whittier ("City") was at all times herein mentioned a Charter City within the meaning

of § 34101 of the Government Code, and is organized and existing under and by virtue of the Constitution of the State of California.

2. Defendant, Walnut Properties, Inc. ("Walnut"), is a corporation organized and existing under and by virtue of the laws of the State of California.

3. At all times herein mentioned Walnut operated and conducted a motion picture theater located at 7038 Greenleaf Avenue, City of Whittier, County of Los Angeles, State of California. The property is zoned for use by a theater.

4. At all times herein mentioned, the City had in effect certain ordinances which provided a method of abatement for legal nonconforming uses of property within the City, and an "Adult Entertainment" ordinance purporting to establish zoning regulations applicable to "Adult Businesses." Said ordinances were judicially noticed by the Court at the time of trial. The "Adult Entertainment" ordinance provides, *inter alia,* that prior to establishing or conducting any adult business a conditional use permit shall be obtained, and that no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located "is not within 1,000 feet of any lot upon which there is located a church, or educational institution, or park, or other public facility which is utilized by minors."

5. On or about July 25, 1978, the Superintendent of Building Inspection of the City advised Walnut that, pursuant to the "Adult Entertainment" ordinance, it was required to modify the existing business so that the same would no longer be an adult business as defined in the ordinance. Walnut appealed the decision of the

Superintendent. The Planning Commission, and subsequently the City Council, upheld the decision of the Supertinendent.

6. Walnut denied that it operated an adult theater as defined in the ordinance and alleged by way of affirmative defense that the ordinance, on its face, and as construed and applied to Walnut, violated the free speech, due process and equal protection provisions of the federal and state constitutions.

CONCLUSIONS OF LAW

1. The portion of § 9512(2)(c) of the Whittier Municipal Code specifically the words "other public facility which is utilized by minors," has the legal effect of prohibiting the location of any adult business on any location within the City in that, the phrase "public facility" means, and includes, among other things, any retail commercial facility which is open to members of the public, and is utilized by minors, such as grocery stores and drug stores.

2. The absolute prohibiton of an otherwise lawful business constitutes a violation of the state and federal constitutions and such ordinance is found to be void as applied to the defendant Walnut herein.

3. Walnut is entitled to a judgment dismissing the complaint against it.

DATED: _____, 1981



VINCENT S. DALSIMER, JUDGE
LOS ANGELES SUPERIOR COURT

APPENDIX K

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Nos. 84-5755, 84-6087
D.C. No. CV 81-2262-R

WALNUT PROPERTIES INC., a California corporation, et al.,

Plaintiffs/Appellees,

v.

CITY OF WHITTIER, a charter city, et al.,

Defendants/Appellants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

To PHILIP B. WINBERRY, Clerk of this Court:

NOTICE IS HEREBY GIVEN that the City of Whittier, et al., Appellants above-named, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on September 30, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED this 20th day of November 1985.

J. ROBERT FLANDRICK, CITY ATTORNEY
CITY OF WHITTIER; and
BURKE, WILLIAMS & SORENSEN

By _____
J. Robert Flandrick
Attorneys for City of Whittier, et al.

APPENDIX L

ORDINANCE NO: 2327

ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADOPTING CERTAIN ZONING REGULATIONS RELATING TO ADULT BUSINESSES (APPLICANT: CITY INITIATED; CASE NO: 353.049)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare, as follows:

(a) That in certain pending litigation, a Federal District Court has determined that the City's Zoning Regulations applicable to adult businesses are valid, with the single exception which is hereinafter described; and

(b) That the Federal District Court's determination of validity, excepted therefrom that provision of the Zoning Regulations which prohibit the location of an adult business within 1,000 ft. of a church; and

(c) That the reason assigned by the Court for such invalidity was that at the time of the original hearings before the Planning Commission and City Council in 1977 and 1978 there was insufficient evidence to justify the conclusion that such a separation between uses was necessary or required; and

(d) That notwithstanding the fact that the portion of the Judgment declaring the provision invalid has been appealed, which appeal is now pending, on the advice of the City Attorney, the City instituted proceedings before the Planning Commission and

City Council, in the time and manner provided by law, to determine whether or not the 1,000 ft. separation should be readopted and placed in the City's Zoning Regulations; and

(e) That the Planning Commission has conducted duly noticed public hearings on said matter and has recommended that the 1,000 ft. limitation be readopted based upon evidence presented by the staff and others to the Commission; and

(f) That this City Council has conducted a duly noticed public hearing upon such matter and based upon the evidence presented, including, but not limited to, the Staff Report and oral testimony presented, and based upon the recommendations of the Planning Commission, including the Planning Commission's file with reference to said recommendation, it appears to the City Council that there is adequate need and evidentiary justification for the imposition of the 1,000 ft. limitation so as to prevent an irreconcilable incompatibility of uses, vis-a-vis, churches and adult businesses located within this City; and

(g) That the public interest, convenience and necessity require the enactment of this Ordinance containing the Regulation relating to the separation of uses as hereinabove described.

SECTION 2. That subsection (c) of subdivision (2) of Section 9512.1 of the Whittier Municipal Code is hereby readopted and reenacted to read as follows:

"(c) Is not located within 1,000 ft. of any lot upon which is located a church; or"

SECTION 3. That the California Environmental Quality Act, as amended, has been complied with with respect

to this proceeding. The City Council and Planning Commission have reviewed and considered the environmental studies conducted and have concluded that a negative declaration is appropriate and proper with respect to this project. That the said declaration be, and hereby is, approved and ordered filed.

SECTION 4. That the City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED THIS 22nd day of May, 1984.

/S/ Myron D. Claxton

MYRON D. CLAXTON, Mayor

ATTEST:

/S/ Sandra Max

SANDRA MAX, Deputy City Clerk

APPENDIX M

ORDINANCE NO. 2257

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses;" and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the enactment of this Ordinance is required for the preservation of the public peace, health and safety.

SECTION 2. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in Zone C-2 or a less restrictive zone; and

(b) is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 and 61 on sale alcoholic beverage license."

SECTION 3. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 4. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 24th day of March, 1981.

/S/ Victor A. Lopez
VICTOR A. LOPEZ, Mayor

ATTEST:

/S/ Jenny Young
JENNY YOUNG, City Clerk

APPENDIX N

ORDINANCE NO. 2254

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ENACTING CERTAIN PROVISIONS RELATING TO ADULT BUSINESSES. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council heretofore enacted certain zoning regulations applicable to "adult businesses"; and

(b) That, in part, said regulations prohibiting the placement of adult businesses within certain distances of residentially zoned properties, and within certain distances of churches, schools, parks, and other kinds of publicly owned facilities; and

(c) That the City Council has been advised that a Judge of the Superior Court has found that one portion of said regulations, in his opinion, violates various constitutional precepts, and thus, is void; and

(d) That in order to prevent such purported invalidity from affecting the overall integrity and intended effect of the adult business regulations, as enacted, it is necessary that the City Council enact this measure, as an urgency ordinance, to eliminate any ambiguity in the said zoning regulations applicable to adult businesses; and

(e) That the immediate enactment of this Ordinance is required for the preservation of the public peace, health and safety; and

(f) That time does not permit the following of the procedures necessary for the adoption of zoning regulations, as described in Section 65800 et seq. of the Government Code, and that this urgency measure is necessary, and authorized by law, to protect the public safety, health and welfare by prohibiting uses which may be in conflict with the contemplated zoning proposal, as is hereinafter described in this Ordinance; and

(g) That the Planning Commission and the Planning staff are hereby instructed to forthwith take the steps necessary to set for public hearing the consideration of regulations which eliminate the possibility of invalidity insofar as the adult regulations are concerned.

SECTION 2. That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. That a statement of facts constituting the basis of such urgency is as set forth hereinabove. That this Ordinance shall be in full force and effect for a period of One Hundred Twenty (120) days from and after the date of its enactment.

SECTION 3. That Section 9512.1 is hereby added to the Whittier Municipal Code to read as follows:

"9512.1 - *ALTERNATE SPECIAL REGULATIONS.* The special regulations set forth in this section shall apply to all uses which are subject to the provisions of this part if for any reason any of the special regulations set forth in Section 9512 hereof are declared invalid as applied to any such use.

(1) That prior to establishing or conducting of any adult business, a conditional use permit

therefor shall be obtained, pursuant to the provisions of Part 9 of this chapter; and

(2) That no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) Is classified in Zone C-2 or a less restrictive zone; and

(b) Is not within five hundred (500) feet of any lot classified in any of the R Zones; and

(c) Is not within one thousand (1,000) feet of any lot upon which there is located a church; or

(d) Is not within one thousand (1,000) feet of any lot upon which there is located any public, private or parochial, elementary, junior high, high school; or

(e) Is not within one thousand (1,000) feet of any lot upon which there is located a City owned, operated and maintained public park; or

(f) Is not within one thousand (1,000) feet of any lot on which there is located another adult business; or

(g) Is not within five hundred (500) feet of any lot on which is located a business with a type 40, 42, 48 or 61 on sale alcoholic beverage license."

SECTION 4. If any section, subsection, subdivision, sentence, clause or phrase of this Ordinance is for any reason held to be unconstitutional or otherwise invalid, such decision shall not affect the validity of the remaining

provisions of this Ordinance. The City Council hereby declares that it would have passed this Ordinance and each section, subsection, subdivision, sentence, clause and phrase thereof irrespective of the fact that any one or more sections, subsections, subdivisions, sentences, clauses, or phrases be declared unconstitutional.

SECTION 5. That the City Clerk shall certify to the adoption of this Ordinance and shall cause the same to be published in the manner prescribed by law.

PASSED AND APPROVED this 3rd day of February, 1981.

/S/ Victor A. Lopez
VICTOR A. LOPEZ, MAYOR

ATTEST:

/S/ Jenny Young
JENNY YOUNG, City Clerk

APPENDIX O

ORDINANCE NO. 2138

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER ADDING PART 20 TO CHAPTER 1, ARTICLE IX, OF THE WHITTIER MUNICIPAL CODE AND AMENDING SECTIONS 9201, 9260 AND 9322 OF SAID CODE, REGULATING AND CONTROLLING ADULT BUSINESSES.

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine, and declare as follows:

(a) That certain businesses, hereinafter defined and described as "adult businesses," are located, and are proposed for location, within areas of the City which are zoned for commercial uses, and are immediately adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Southern California, and other areas, has demonstrated that such uses, when located in immediate proximity to one another, have operational characteristics which have a deleterious effect on immediately adjacent residential and commercial areas; and

(c) That the concentration of such uses substantially contributes to blighting and downgrading of adjacent commercial and residential areas; and

(d) That it is evident that special zoning regulations applicable to these and similar uses, are necessary to preserve the integrity of existing commercial areas of the City, and of residential areas which are in close proximity to such commercial areas; and

(e) That the public interest, convenience, necessity, and the general welfare of the City requires that such special zoning regulations be enacted.

SECTION 2. That Part 20 be, and is hereby, added to Article IX, Chapter 1 of the Whittier Municipal Code, consisting of Sections 9510 through 9513, inclusive, to read, respectively, as follows:

PART 20 - ADULT BUSINESSES

SECTION 9510. *Purpose* -- The purpose of the adoption of the provisions of this Part is to establish a comprehensive set of regulations applicable to adult businesses and similar and related uses.

SECTION 9511. *Definition* - In addition to the definitions contained in Section 9110 et seq., of this Chapter, the following words and phrases shall, for the purposes of this Part, be defined as follows, unless it is clearly apparent from the context that another meaning is intended:

1. *"Adult Book Store"* shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or related to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

2. *"Adult Business"* shall mean any business which is conducted exclusively for the patronage of adults, and as to which minors are specifically excluded from patronage thereat, either by law or by the operators of such business. "Adult Business" shall

also mean and include adult book stores, adult theaters, massage parlors, and modeling studios, adult motels or hotels, but not including those uses or activities, the regulations of which is preempted by State law.

3. *"Adult Hotel/Motel"* shall mean a hotel or motel, as defined in Section 9111(H) and (M) of this Code, which provides, through closed circuit television, or other media, material which is distinguished or characterized by the emphasis on matter depicting or describing or related to specified sexual activities or specified anatomical areas.

4. *"Adult Theater"* shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas.

5. *"Material"* relative to adult businesses, shall mean and include, but not be limited to, accessories, books, magazines, photographs, prints, drawings, paintings, motion pictures, and pamphlets, or any combination thereof.

6. *"Massage Parlor"* shall mean any establishment required to be licensed pursuant to Section 6280 et seq., of the Whittier Municipal Code.

7. *"Modeling Studio"* shall mean any establishment or business which provides for members of the public, the services of a live human model for the purpose of reproducing the human body, wholly or partially in the nude, by means of photography, painting, sketching, drawing, or other pictorial form.

8. *"Specified Anatomical Areas"* shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;

(ii) buttock, and

(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

9. *"Specified Sexual Activities"* shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

SECTION 9512. *Special Regulations* - All uses subject to the provisions of this Part shall comply with all of the regulations contained in this Chapter, and the following regulations:

1. that prior to establishing or conducting of any adult business, a conditional use permit therefor shall be obtained, pursuant to the provisions of Part 8 of this Chapter; and

2. that no adult business shall be granted a conditional use permit unless the lot upon which such business is proposed to be located:

(a) is classified in zone C-2 or a less restrictive zone; and

(b) is not within 500 feet of any lot classified in any of the R zones; and

(c) is not within 1,000 feet of any lot upon which there is located a church, or educational institution, park, or other public facility which is utilized by minors; and

(d) is not within 1,000 feet of any lot on which there is located another adult business; and

(e) is not within 500 feet of any lot upon which is located a business with a type 40, 42, 48, or 61 on-sale alcoholic beverage license.

SECTION 9513. *Nonconforming Adult Businesses* - All adult businesses which were lawfully in existence as of the effective date of Ordinance No. 2138, and which were rendered nonconforming by the application thereto of the provisions of this Part, shall be subject to abatement in the times and manner set forth in Part 10 hereof.

SECTION 3. That subsection 9 of Section 9260 of the Whittier Municipal Code be amended by adding subparagraph (bb) to read:

(bb) Adult business, subject to the provisions of Part 20 of these regulations.

SECTION 4. That subsection 2 of Section 9322 of the Whittier Municipal Code is hereby amended by adding thereto, as subparagraphs (l) and (m), the following:

(l) Adult book stores and adult theaters, in existence as of the effective date of Ordinance No. 2138, 120 days after the effective date of said Ordinance No. 2138.

(m) Adult businesses, lawfully in existence as of the effective date of Ordinance No. 2138, other than

those referred to in subsection (1) hereof, a period of 18 months after the effective date of said Ordinance No. 2138.

SECTION 5. That subparagraph (55) of Section 9201 of the Whittier Municipal Code is hereby deleted.

SECTION 6. That the City Council has considered the initial study conducted with respect to the matter above described. The City Council has, as a result of its said consideration, and the evidence presented at the hearings on the said matter, determined that the negative declaration as heretofore filed and proposed as a result of the said initial study, is appropriate, and does hereby find that the said negative declaration has been prepared and considered pursuant to the provisions of the California Environmental Quality Control Act of 1970, as amended, and does hereby approve the said negative declaration.

SECTION 7. *Severability* - If any section, subsection, sentence, clause, phrase or portion of this Ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council hereby declares that it would have adopted this Ordinance and each section, subsection, sentence, clause, phrase, or portion thereof, irrespective of the fact that any one or more sections, subsections, phrases, or portions be declared invalid or unconstitutional. If for any reason this Ordinance or any part thereof should be declared invalid or unconstitutional, then the original ordinance, or ordinances, which this Ordinance, or part thereof, supersedes shall be in full force and effect.

SECTION 8. That the City Clerk shall certify to the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

APPROVED and ADOPTED this 7th day of February, 1978.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

JENNY YOUNG, CITY CLERK

APPENDIX P

ORDINANCE NO. 2121.

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER EXTENDING THE TERM OF ORDINANCE NO. 2116 FOR A PERIOD OF EIGHT (8) MONTHS. (URGENCY MEASURE)

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That on or about June 21, 1977, this City Council enacted Ordinance No. 2116, which had the effect of imposing, as an urgency measure, certain zoning regulations pertaining to adult businesses, as therein described; and

(b) That the said Ordinance required that the Planning staff and Planning Commission conduct a full and complete study for the purpose of recommending to the City Council final and permanent zoning regulations to be applied to such adult businesses; and

(c) That this City Council is in receipt of a Staff Report indicating that such study, although pursued with due diligence, has yet to be completed and that additional time is required therefor, due to the complexity of such study; and

(d) That said Ordinance No. 2116 will expire, prior to the completion of such study, unless the same is, pursuant to law, extended for an additional period of eight (8) months; and

(e) That the facts and circumstances as recited in said Ordinance No. 2116 still obtain, and the

said regulations as imposed by said Ordinance are still required for the reasons therein stated; and

(f) That a duly noticed public hearing was conducted by the said City Council for the purpose of considering whether the facts were such as to warrant the extension, for a period of eight (8) months, of the terms and provisions of said Ordinance No. 2116; and based upon the evidence presented at said hearing, it appears that such extension of time is warranted and required in order to protect the public peace, health and safety and to promote the public interest, convenience and necessity.

SECTION 2. That the terms and provisions as set forth in said Ordinance No. 2116 are hereby re-enacted and readopted and the said ordinance is hereby extended for a period of eight (8) calendar months from and after the date of adoption of this ordinance. This ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting its urgency is as set forth above.

SECTION 3. That the City Clerk shall cause this ordinance to be published in the manner prescribed by law.

PASSED and APPROVED this 11th day of October, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

City Clerk

CITY OF WHITTIER)
) SS
STATE OF CALIFORNIA)

I, Jenny Young, City Clerk in and for the City of Whittier, California, hereby certify that the above and foregoing is a true and correct copy of Ordinance No. 2121, adopted by the City Council of the City of Whittier in regular session, Tuesday, the 11th day of October, 1977, and that same was passed by the following vote:

Ayes:	J. E. McDonald	R. L. Henderson
	B. P. Sanborn	J. A. Mele
Noes:	None	
Absent:	D. L. Murphy	

WITNESS my hand and the official seal of the City of Whittier this 12th day of October, 1977.

/S/ Jenny Young

JENNY YOUNG, City Clerk

Published according to law, October 18, 1977.

APPENDIX Q

ORDINANCE NO. 2116

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF WHITTIER RELATING TO THE REGULATION AND CONTROL OF CERTAIN ADULT BUSINESSES (URGENCY MEASURE).

THE CITY COUNCIL OF THE CITY OF WHITTIER DOES ORDAIN AS FOLLOWS:

SECTION 1. That the City Council of the City of Whittier does hereby find, determine and declare as follows:

(a) That this City Council has been advised that certain adult businesses, as hereinafter defined and described, have been proposed to be located within areas of the City which are zoned for commercial uses, and are adjacent to residential areas; and

(b) That experience in this City, as well as in other portions of Los Angeles County, have demonstrated that such uses have objectionable operational characteristics which have a deleterious effect upon immediately adjacent residential and commercial areas; and

(c) That a concentration of such uses contributes to blighting or downgrading commercial areas; and

(d) That such concentration also has the effect of blighting adjacent residential areas; and

(e) That it appears that special zoning regulations applicable to these and other similar uses is necessary to preserve the integrity of the existing commercial areas of the City, and of residential areas which are located in proximity to such commercial areas; and

(f) That to allow such uses to be located in such areas without any interim regulations and control could have the effect of frustrating the contemplated zoning proposal, as above described; and

(g) That this Ordinance is immediately required to preserve such commercial and residential areas from the possible effect of blighting or downgrading, during such period of time as may be reasonably necessary to permit the City's Planning Department and Planning Commission to make a complete study and review as to precisely the nature of permanent zoning regulations to be imposed in order to protect such commercial and residental areas within the City, from a blighting or downgrading effect; and

(h) That the public interest, convenience and necessity require that this Ordinance be immediately adopted for the reasons above set forth.

SECTION 2. That notwithstanding any other provision of the Whittier Zoning Regulations, during such time as this Ordinance is in full force and effect, the uses hereinafter referred to shall be prohibited, except as herein provided:

(a) *DEFINITIONS*: For the purpose of this Ordinance, the phrases hereinafter set forth, shall be defined as follows:

(1) "Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing or relating to specified sexual activity or specified anaotmical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.

(2) "Adult Business" shall mean and include an adult book store or adult theater.

(3) "Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized, by their emphasis on matter depicting, describing or relating to specified sexual activity or specified anatomical areas.

(4) "Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

(5) "Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;

(ii) buttock, and

(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

(6) "Specified Sexual Activities" shall mean:

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock or female breast.

(b) *PROHIBITION OF CERTAIN USES.* That from and after the adoption of this Ordinance, no person shall establish or conduct, or permit to be established or conducted, upon any real property located within the City, an adult business, except in accordance with the provisions of this Ordinance.

(c) *CONDITIONAL USE PERMIT REQUIRED.* Adult businesses shall be permitted pursuant hereto only if,

(1) a conditional use permit therefor is first obtained; and

(2) the real property upon which use is proposed to be located, is classified, pursuant to the Whittier Zoning Regulations in Zones C-2, C-3 and M; and

(3) that the proposed location is not within 250 feet of any other real property which is classified in Zone R-E, R-1, R-2, R-3, or R-4; and

(4) that the proposed location is not within 500 feet of any other real property upon which there is located an adult business.

SECTION 3.That this Ordinance is hereby declared to be an urgency measure and shall take effect immediately upon its adoption. A statement of facts constituting the basis of such urgency is as above set forth. The legal authority for the enactment of this Ordinance is Section 65858 of the Planning Act of the State of California, and other applicable statutes.

SECTION 4. The City Clerk shall certify the adoption of this Ordinance and cause the same to be published in the manner prescribed by law.

PASSED and APPROVED this 21st day of June, 1977.

/S/ Jack Mele

JACK MELE, MAYOR

ATTEST:

/S/ Jenny Young

City Clerk

APPENDIX R

STAFF REPORT
AMENDMENT TO ZONING REGULATIONS
ADULT BUSINESSES IN C-2 ZONE WITH CONDITIONAL USE PERMIT
CASE NO. 353.015
JANUARY 9, 1978

Since 1969, beginning on Whittier Boulevard, easterly of the 605 Freeway, the community has experienced a rapid growth of adult businesses. Beginning in the unincorporated County area with an adult bookstore, the uses have expanded to include a theater, massage parlors, and model studios, and now stretch to the central business district of Whittier. Fifteen adult businesses now exist, thirteen of which are located in the City of Whittier.

On June 21, 1977, the City Council adopted Ordinance 2116, as an urgency measure, defining and regulating certain adult businesses through the conditional use permit process. The Council in the adoption of said ordinance declared that such uses have operational characteristics which may have a deleterious effect on immediately adjacent residential and commercial areas. The purpose of the urgency measure was to attempt to keep the situation status quo so that the issue could be studied and appropriate regulations, if necessary, be adopted in order to protect such commercial and residential areas within the City from the possible blighting or downgrading effect of adult business. Ordinance 2116 was amended on December 7, 1977 by Ordinance 2128 which added two uses to those regulated.

The urgency ordinance was modeled after an ordinance of Detroit, Michigan, which was upheld by the U. S. Supreme Court in June of 1976. Said ordinance dispersed such uses by use of separation distances from one another and from residential districts. Extensive

discussion of the Detroit Ordinance and others appears in the American Society of Planning Officials Report No. 327, "Regulating Sex Businesses," a copy of which is enclosed. (Copies furnished only to the City Council, Planning Commission, and the file. The file copy may be reviewed in the office of the Planning Department.)

EXISTING USES

Currently, there are adult businesses at the following locations:

Address	*Type of Business*
10529 Whittier Blvd.	Model studio
10555 Whittier Blvd.	Model studio
10619 Whittier Blvd.	Model studio
10703 Whittier Blvd.	Model studio
10705 Whittier Blvd.	Book store
10711 Whittier Blvd.	Model studio
10713 Whittier Blvd.	Massage parlor
10824 Whittier Blvd.	Massage parlor
11205 Whittier Blvd.	Massage parlor
11527 & 29 Whittier Blvd.	Model studio
11531 Whittier Blvd.	Book store
11729 Hadley	Massage parlor
7038 Greenleaf	Theater

The first of these, at 11729 Hadley Street, took out permits for partitions in January of 1969. The use of the building was stated as "physio-massage." Another massage parlor opened in 1976, at 11625 Hadley, but closed shortly thereafter. Several of the businesses have in these few years, changed hands and locations. At 10510 Dorland, a permit has been requested to convert an existing residence to a model studio, and is currently awaiting dedication of street right-of-way for issuance of permit.

STAFF STUDY

Since June 21, staff has been collecting and analyzing data and reviewing testimonies and contacting other agencies in efforts to determine what effect adult businesses have on adjacent properties. The one major factor to keep in mind in reviewing the data, however, is that not all of it can be isolated as being directly related only to the presence of adult businesses because of the variety of the factors influencing the study areas over the last ten years.

The study compared two areas on Whittier Boulevard over a ten-year period. Said areas are shown on the attached map. Area One, between Redman Avenue and Norwalk Boulevard, contains the largest concentration of adult businesses, the other, Area Four, easterly of Painter Avenue, between Jacmar and Watson Avenues, had no commercial frontage on Whittier Boulevard, and was used as a control. Area Four was selected because of its similar street patterns, lot sizes, and number of homes, to those of the first, where the adult businesses were concentrated.

The ten years compared were 1968 through 1977 (including some 1967 date where 1968 was not available). The first adult business on Whittier Boulevard was licensed on November 29, 1971, but the first in the study area appeared in 1973, and by late 1974, more than half of the current businesses were in operation. Therefore, the end of 1973 was selected as the date to be used to compare before and after affects.

The following is a summary of the results of the study, and indicates the factors considered:

	Study Area One		Study Area Four	
	Number	Per Cent	Number	Per Cent
1. Number of homes	160		175	
2. Number of businesses				
1967	17			
1976	19		0	
3. (a) Number of changes of occupant				
Homes	154	96	170	97
Business	37	205	0	
(b) Changes since 1973				
Homes	88	57	32	19
Business	17	46	0	
(Adult businesses)	(7)	(19)		
4. Number not changed				
Homes	67	41	79	45
Business	5	28	0	
5. Number of homes sold				
(a) At least once	46	28	79	45
(b) Since 1973	26	57	58	61
Average sale price				
1968	$19,100	7	$18,750	5
1969	17,000	2	19,000	6
1970	21,000	2	20,500	3
1971	25,400	5	20,000	3

1972	20,500	4	20,650	7
1973	21,500	2	20,500	9
1974	28,300	4	22,125	7
1975	26,100	7	26,000	9
1976	31,100	9	30,800	14
1977*	36,500	8	37,227	18

*Projected from 6 month data

6. Median Home Value
   (1970) $18,214 $18,280

7. Per cent owner occupied

1970	64	82
1977	84	85

8. Ages of housing 39 years 27 years

A further breakdown of the study area one, into the first and second blocks northerly of Whittier Boulevard reveals that the percentages in items 3, and 5 above, are slightly higher in the first blocks than in the second blocks by 5 to 15 per cent.

Item 3 (b), above, shows a major difference between study areas one and four of 36% (57 - 19) in number of changes in occupancy. Item 5 shows that the rate of sales of housing is about the same (57% - 61%), but item 7 shows that the owner occupancy rate has increased from 64% to 84% in study area one. This trend is supported by testimony at a recent public meeting, soliciting such information.

For business properties, the picture is more conclusive than for residential. Expanding items 3 and 4, above, in the business category, we find the following:

Number of changes in occupancy	since 1967	37
	since 1973	17
Number changing more than once	since 1967	12
	since 1973	4
Number not changing	since 1967	5
	since 1973	10
Number of changes to adult businesses		7

In addition to the above data, the annual vacancy rate dropped in 1976 to the level in 1966, having increased, to a peak of three and one-half times that level in 1972. It must be noted, however, that this apparent stability is due to the fact that adult businesses now occupy previously vacant buildings.

The Whittier Police Department has, during the last few years, been collecting evidence in efforts to eliminate alleged illegal activities from the adult businesses. As a result of these efforts, seven of the existing businesses are presently the subject of "red light abatement" action. The initial investigation and evidence gathering documented that all of the nude model studios and three of the massage parlors were actively involved in prostitution. Other problems created by the presence of these businesses are in the form of assault and battery and aggravated assault incidents. There have also been several thefts reported by the customers (johns) who are victimized by the employees. These individuals usually do not file complaints on the incidents, however, fearing that their spouses will become aware of their activities. Therefore, these incidents always do not appear on the police logs.

For several years, the Police Department has received complaints of excessive noise, pornographic material left

laying about and in some instances sexual offenders, such as exhibitionists, venting their sexual frustrations in the adjoining neighborhood. Another problem posed by the patrons of these adult businesses is the influx of drunk drivers and intoxicated persons. The majority of customers frequenting the business after 4:00 p.m., and until the early morning hours are males who have been drinking and are seeking sexual release. The Police Department has compiled from the daily logs for the two, four-year periods, 1970-1973 and 1974-1977, the number of incidents of 38 types of criminal activity and the data compared with the City as a whole.

This comparison revealed the following numbers of incidents in the given years:

1970 - 23	1974 - 57
1971 - 29	1975 - 73
1972 - 52	1976 - 90
1973 - 29	1977 - 49
1970-73 - 133	1974-77 269

The comparison of the totals of each four-year time period shows an increase of 102% in incidents of crime in the period 1974-77 over the period 1970-73, whereas, the City as a whole for the same period, experienced only an 8.3% increase in incidents of crime.

Some specific crimes increased in greater proportions as indicated in the following figures for slected crimes:

CRIME	1970-1973	1974-1977	% increase
All Assaults	8	39	387
Theft (Petty)	13	29	123
Robbery	8	13	63
Burglary (Residential)	15	23	53
Malicious Mischief	3	24	700

Prostitution	3	12	300
Grand Theft Auto	5	14	180
Theft (Grand)	4	9	125
Arson	0	5	
Displaying a Weapon	0	5	
Prowling	0	5	

Some crimes, on the other hand, decreased in frequency, such as felony narcotics, which decreased from 16 to 9, but due primarily to changes in narcotics laws. Eight other crimes decreased from one or two incidents in four years to zero to one incident in four years. Nineteen of the remaining types of crimes increased, while ten types were reported for the first time during the time period of 1974-1977.

At various public meetings, over the last several years, citizens have testified of being afraid to walk the streets, that some businesses have left the area or have modified their hours of operation, and that they are fearful of children being confronted by individuals of offensive character or of being exposed to sexually explicit material.

At a recent meeting, several of those who spoke, but lived some distance from the adult businesses, spoke on behalf of those who lived closer, but feared reprisals if they testified.

At one time, there was a general complaint from parents in the neighborhood that their minor children had been in possession of the negative portion of Polaroid film packs and although this image was not as clear as the positive portion, it clearly showed the lewd poses of the models working in the studios. Young males would rummage through the trash receptacles of the various businesses and pick up these items. It was

noted during Police Department investigation of the alleged prostitution activities at these nude model studios, that they had become aware of the complaints and refused to allow Polaroid cameras in the businesses. This did not, however, stop the problem of adult newspapers obtained at the book store being left strewn in the parking areas and alleys adjacent to the businesses.

Rates and numbers of changes of occupancy of residences and increases in complaints to the Police Department are the only measurable indicators of the moral and emotional impact of adult businesses on the surrounding neighborhood. This impact is, however, the most difficult to assess and is probably the most significant as it relates to the mental and physical well-being of the neighborhood and the City as a whole.

The health, welfare, and general prosperity of the community are some of those things which facts and figures cannot adequately describe, but the protection and furtherance of which is part of the stated purpose for the development of land use regulations.

An indication of the intensity of the moral and emotional impact is the unity of the residents and their willingness, through organizations, such as Citizens for Decency Through Law, to work for improvement of their neighborhood. This organization has been successful in eliciting support of other organizations to help in said efforts.

Aesthetics are a matter of personal preference, but plays an important role in effecting peoples' attitudes. Regulations, such as the sign ordinance, may not control content or colors of buildings or signs. Typically, the adult businesses are painted in garish, high contrast colors, utilizing flashing or moving lights to attract attention to the businesses. This technique is not,

however, unique to such businesses, but is quite common in marginal, strip commercial areas. It is noted that one other major strip commercial use, fast food restaurants, are beginning to change their images from the bright roofs, big signs and giant logos, to the softer, more contemporary, brick, wood, and tile, finding that their success does not depend entirely on their visibility. They have found that those who wish to avail themselves of the services offered will seek them out. The same philosophy could also be applied to adult businesses, allowing them to blend into other commercial neighborhoods.

Dispersion or Concentration

Two basic types of ordinances have been enacted by cities across the United States, dispersing or concentrating. In contrast to the Detroit ordinance, Boston created an "adult entertainment" district, concentrating adult businesses into what became known as the "combat zone." The purpose was to concentrate adult businesses into a single small area to prevent them from spreading into other areas of the City.

The Boston experience failed, however, because, according to Boston police and redevelopment spokesmen, "they (the property owners) killed the goose that laid the golden egg," by not policing themselves.

In Detroit, as in Boston, the problem was primarily in large downtown commercial districts and "skid rows." In these areas, adult entertainment businesses mingled with pawnshops, cheap hotels, bars, strip joints, etc., as well as the "non-porno" businesses. Property owners, attracted by the high rents, willingly paid by the adult businesses, eventually forced many legimate businesses to close, move, or go broke by increasing rents.

In the Hollywood area, as reported in several articles appearing in the *Los Angeles Times,* owners have stated that they don't particularly care for the type of business, but like the rent that will be paid by these businesses. This could be a major factor in low rent commercial areas. In the Hollywood area, the influx of adult businesses appears to have been followed by a higher vacancy rate. In West Whittier, however, the commercial area between Redman Avenue and Norwalk Boulevard, suffered from a higher vacancy rate before the commencement of adult businesses than after, but largely because adult businesses occupy those buildings which were most frequently found vacant. It could be expected that an owner of a vacant building would accept the high offers for rent with a good chance that the building would stay rented.

For the purpose of determining impact of concentration of adult businesses, four areas were compared, using Polk directories from 1967 to 1977 (1966 thru 76 information), to determine the rate of change of occupancy in adjacent residential neighborhoods before and after the introduction of adult businesses. Three of the surveyed areas contained adult businesses, the fourth, the control area, used for the entire study, included no commercial. Area one has six adult businesses, area two has one, and area three has three. The following map shows the areas studied. The results are as follows:

	Changes Per Year Before A.B.'s	Changes Per Year After A.B.'s
Area 1	9.4	22 (1974+)
Area 2	.1	.1 (1972+)
Area 3	5.3	11 (1974+)
Area 4 (Control)	20	11 (1974+)

Area 1, with a concentration of adult business by 1974, experienced a 134% increase in annual turnover rate, Area 2 experienced no measurable change, Area 3, with three businesses at one location, experienced a 107% increase. The control area, with no commercial and no adult businesses, experienced a 45% decrease in turnover rate for similar periods.

If dispersion is determined to be the most effective type of control (short of prohibition) to impose on such uses to protect adjacent properties, the question then becomes how much dispersion -- how much separation between related uses and from adjacent residential uses.

The Supreme Court in the Detroit case found no objection to the 1,000 ft. separation of "regulated businesses" and 500 feet from residential districts. As mentioned earlier, Detroit's ordinance was developed for a large downtown, with a skid row area. With the exception of Whittwood, the Quad, Uptown Whittier, and the industrial area, Whittier's commercial areas are strips of shallow commercial lots along Whittier Boulevard and intersections of major streets. Almost any separation between residential districts and adult businesses eliminates these businesses from the strip commercial areas, forcing them into Uptown or the shopping centers.

The issue of separation of adult businesses from schools, churches, parks, and similar public assembly areas, has also been raised and dealt with in ordinances of other municipalities. Currently, the closest adult businesses to any of these public uses is 470 ft. from a church, 300 ft. from a park, and 1,100 ft. from a school.

Any distance requirement must, however, be based on the relationship between distance and degree of impact. Brief discussion with the principal of Franklin

School and a representative of Whittier Presbyterian Church, revealed that neither had seen any evidence of direct impacts on their institution by the adult businesses. Both were very much aware of their presence, however, and the principal at Franklin School stated that several families who have moved from the area cited the presence of said businesses. One businessman who relocated to another area in the City, stated that the businesses were not a factor but that his clients now comment on the improvement.

The park referred to is McNees Park, at Whittier and Hadley, in the unincorporated County area. Whittier Police Department indicates that while the park is the scene of many arrests and source of many problems, no definite correlation can be made between the problems and its proximity to adult businesses.

Only one church is within the areas where the current urgency ordinance would allow adult businesses. Other churches are within 250 feet of the area uptown where such businesses could be located. Whittier High School is also within 250 ft. of allowable location in the M zoned area and St. Mary's parochial school is within 500 feet. Central Park (Bailey and Washington) is also within 250 feet of property eligible for the location of adult businesses.

Police records show that complaints of public drunkenness are more frequent in the areas around adult businesses where they are also in close proximity to bars and taverns which are not "bonafide eating places." There may, therefore, be reason to separate adult businesses from businesses with certain types of on-sale alcoholic beverage permits issued by the Alcoholic Beverage Control Board.

Churches, schools, and other public facilities are closed much of the time and do not present the opportunities which the parks do. The peak use hours of adult businesses are evenings, when schools, churches, and most public facilities are closed. Therefore, the effect on these uses would naturally be less than on uses which were all day uses, such as parks, or which, like residences, have evening and weekend "peak use" or enjoyment times. For these reasons, it may be in the community interest to require separation between adult businesses and parks. Five hundred feet should be considered a minimum separation, as this distance can be easily walked in less than five minutes. A thousand feet would require an individual to purposely set out to walk whereas 500 feet or under can be "wandered into."

Based solely on the study of one adult business, located almost in the midst of a residential neighborhood (area 2), and its effect on that neighborhood, it would appear that a 500 ft. separation from residential areas is adequate so long as the adult businesses are separated from one another to avoid concentration.

Adequate separation between adult businesses would also lessen the visual or aesthetic impact of concentrations such as businesses caused by their usual garish colors and flashing signs.

In addition to adult businesses, the Detroit ordinance included, when originally adopted as a skid row ordinance in 1962, as "regulated uses," Group "D" cabaret, establishments for the sale of beer or intoxicating liquor for consumption on the premises, hotels or motels, pawnshops, pool or billiard halls, public lodging houses, secondhand stores, shoeshine parlors, and taxi dance halls. Adult bookstores and adult theaters were added to this ordinance in 1972.

The Group "D" cabaret mentioned above is a topless or nude cabaret. Cabarets in the City of Whittier are currently regulated through a permit processed through the City Council. Other establishments for on-premise consumption of alcoholic beverages are currently regulated through the conditional use permit process. Pool or billiard halls, secondhand stores, and pawn shops, are permitted uses in the C-2 zones and by themselves present no evidence of any deleterious effect on adjacent properties. Shoeshine parlors and taxi dance halls are more or less unique to the skid row areas of the large cities and do not exist in Whittier nor are they expected to.

None of these uses are inherently attracted to one another, but all seem to be common to skid row areas. The skid row aspect of the Detroit ordinance has no bearing on Whittier's situation and staff cannot substantiate the need for any further regulation of those uses which are not classified as adult businesses.

In some areas, adult only motels and hotels have been established, featuring closed circuit TV showing pornographic movies as well as providing other "services," similar to the adult businesses discussed above. Staff feels that the likelihood of this type of business occurring in Whittier is not too great as these are more prevalent in areas of high transient traffic. Rather than attempt to define such a use in anticipation of its occurring, the proposed definition of adult businesses should provide adequate control over such a use.

Definitions

Defining an "adult business" is difficult, particularly when trying to separate them from other uses with similar names. The current urgency ordinance uses as its base,

the definitions which appear in the Detroit ordinance with minor modifications.

The key to the Detroit definitions is the "specified anatomical areas" and "sexual activities." However, such terminology is not immediately applicable to such uses as modeling studios, massage parlors, body painting studios, escort service, rap centers, and similar uses which utilize live humans for providing services. These uses differ from theaters and bookstores in that the latter uses reproductions of humans and the "specified anatomical areas" can be easily applied.

In defining individual adult businesses, the following have been used:

> "Adult Book Store" shall mean an establishment having as a substantial or significant portion of its stock in trade, material which is distinguished or characterized by its emphasis on matter depicting, describing, or relating to specified sexual activity or specified anatomical areas, or an establishment with a segment or section thereof devoted to the sale or display of such material.
>
> "Adult Business" shall mean and include an adult book store, adult theater, massage parlor, or modeling studio.
>
> "Adult Theater" shall mean a theater which presents live entertainment or motion pictures or slide photographs, which are distinguished or characterized by the emphasis on matter depicting, describing, or relating to specified sexual activity, or specified anatomical areas.
>
> "Massage Parlor" shall mean an establishment or business which is required to be licensed pursuant

to Section 6280 et seq of the Whittier Municipal Code.

"Material" shall mean, and include, but not be limited to, books, magazines, photographs, prints, drawings, or paintings, motion pictures, and pamphlets, or any combination thereof.

"Adult Modeling Studio" shall mean an establishment or business which provides the services of modeling for the purpose of reproducing the human body wholly or partially in the nude by means of photography, painting, sketching, drawing, or otherwise.

"Specified Anatomical Areas" shall mean:

(a) less than completely and opaquely covered:

(i) human genitals, pubic region;
(ii) buttock, and
(iii) female breast below a point immediately above the top of the areola; and

(b) human male genitals in a discernibly turgid state, even if completely and opaquely covered.

"Specified Sexual Activities" shall mean

(a) human genitals in a state of sexual stimulation or arousal; and/or

(b) acts of human masturbation, sexual stimulation or arousal; and/or

(c) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast.

In the Detroit case, the phrase "distinguished or characterized by an emphasis on matter depicting. . ." was attached as vague. But, since there was no question in the Detroit case as to whether the material was "distinguished or characterized by an emphasis on matter depicting," the court did not rule on the vagueness of such a definition. A similar vagueness is found in the definition of adult bookstore where the phrase reads, "an establishment with a segment or section devoted to the sale or display of such material." The City's urgency ordinance narrows the vagueness some by using the phrase, "substantial or significant portion of its stock in trade . . . depicting. . . ." Such words as substantial, significant, distinguished by, segment and section usually require the courts to provide the narrowing.

A number of cities define adult businesses as:

> ". . .any business which is conducted exclusively for the patronage of adults, from the premises of which minors are specifically excluded, either by law or by the operation of such business."

Such a definition will generally encompass any use which the City is attempting to regulate and gets around the touchy question of content of material, relying on existing State and local regulations. These regulations are briefly discussed below.

The Whittier Municipal Code, Section 6288, prohibits giving a massage to or admitting any person under 18 years of age into a massage parlor unless parent or guardian has consented thereto in writing.

Minors are currently excluded specifically from adult bookstores and adult theaters by Section 313.1 of the Penal Code of the State of California because of the "harmful" content of the material available.

Section 309 of the Penal Code prohibits admitting minors into places of prostitution, but the law does not prohibit admitting a minor to view the physical body and photograph it for his own use. In this case, the exclusion is imposed by the management of the business who is not required by law to do so but does so out of fear of the possibility of being found guilty of contributing to the delinquency of a minor pursuant to Section 272 of the Penal Code.

The difficulty at this point in time with a general definition is that litigation is still pending on one such ordinance whereas the court has sanctioned, though on a 5 - 4 vote, the definitions contained in the Detroit ordinance.

The two types of definitions can, however, be used together. The severability clause (Section 9105) of the zoning regulations would protect one definition if the other was ruled against by the court. If the courts should rule in favor of the general definition, then the ordinance is that much stronger and accomplishes the overall goal of regulating existing and future adult business uses and eliminates the need for defining every possible business which might be conjured up.

Control

Assuming the dispersion approach is the most acceptable, two methods are available as alternatives to determining where adult businesses can be located. The first is to permit them by right in given zones, with the locational criteria. The second is to require approval through a permit process of some kind. The conditional use permit is the only tool available to the City for this type of control.

By allowing the use to be established by right, the City relinquishes control over the use other than through

enforcement of criteria which might be established. Such regulation fails to take into account special circumstances relative to a specific location, on which adult businesses might have impact. The conditional use permit process allows staff and Planning Commission to review each request and requires the applicant to show that the use will not have an adverse impact on the area and that there is a demonstrated need for the use at that location.

The question remaining then is which zone is appropriate. Being a commercial use, an adult business would be limited to one of the C zones or the M zone. The C-0 zone is intended for offices and uses which service offices or employees of office type uses, such as beauty and barber shops. The C-0 zone, as well as the C-1 zone, act somewhat as transitional or buffer zones, often separating heavier C-2 zones from residential zones and allowing residential uses as as well. Adult businesses in the C-0 and C-1 zones would not be able to meet any reasonable separation criteria. The C-2 zones, though often separated from residential districts by C-0 and C-1 zones are not ideal either because of their proximity to residential uses and the shallow depths of most C-2 zoning which makes meeting separation criteria difficult.

The courts have said that restrictions on a legal business cannot be such that the effect is elimination or prohibition of such uses. First permitting adult businesses in the C-2 zone would provide reasonable flexibility through the conditional use permit process for the approval of a limited number of adult businesses in several areas of the City.

Abatement of Nonconforming Uses

It is quite obvious that any requirement for separation from residential areas and between businesses will have the effect of making all of existing adult businesses, with the exception of the theater Uptown, nonconforming uses, subject to abatement.

The courts have held that reasonable time must be given in the amortization of nonconforming uses. Such time limits must commensurate with investment involved and based on the nature of the use.

The improvement made to structures in which existing adult businesses are located were basically partitioning and signs. The valuation listed on the permits ranged from (total of all permits on property) $1,000 to $12,450, averaging $3,185 per adult business. Three locations apparently had no modifications which required building permits. The permit fees amounted to a total of $572.95, averaging $47.75 per business. One case of high valuation and permits resulted from the repair to a structure after extensive fire damage. These amounts are not, in staff's opinion, significant investments for the use, and on the high rate of return on adult business investments any costs should have been amortized several times.

The courts in 1974 upheld an 18-month amortization of a use declared a public nuisance, where users had no investment in any permanent improvements on the property and where users had adequate time to make plans to move and where there was substantial evidence that there was adequate properties favorably zoned in the county which could be used to locate the business.

A reasonable amortization should not be less than 18 months nor need be longer than two or three years. Where the conformity only requires a change in the stock in trade, such as books or a change in the material

presented as in a theater, the amortization period can be shorter. The proposed ordinance would provide 90 days in this case.

Conclusion

The information obtained and reviewed during the conduct of this study has definitely shown that concentration of adult businesses in the City of Whittier have had an adverse impact on the adjacent neighborhoods. The increases in crime and residential occupancy turnover are two of the key indications of neighborhoods beginning to decline and deteriorate. The City's intent in regulating such businesses is to prevent them from causing deterioration in adjacent neighborhoods. Assuming that such regulation, now pending is timely, that is, not too late, some of the more physical evidences of deterioration are not blatantly evident. However, experiences of other municipalities and of individuals support the impact of prolonged concentration of such businesses.

Inasmuch as the courts have prevented the outright prohibition of adult businesses, regulation is the only control left to the cities. It is evident from the study that individual, isolated businesses do not have nearly as great an impact as concentrations.

Therefore, the dispersion of adult business in certain areas of the City is the most appropriate form of regulation, using the conditional use permit process to review each application.

The Supreme Court has upheld 1,000 foot and 500 foot separations in the Detroit case. These separations are adequate for Whittier's situation. In certain circumstances, lesser separation would accomplish the same end, but structuring an ordinance with specific areas complicates its enforcement.

The effect of such separation would make portions of the industrial areas and shopping centers eligible locations for adult businesses, subject to conditional use permit approval.

All of the existing locations of adult businesses would become nonconforming under the provision of the proposed ordinance and required to conform within the prescribed abatement periods.

Recommendation

Staff recommends that the Planning Commission recommend that the City Council find that the regulation of adult businesses is required for the preservation of the integrity of existing commercial area and residential areas in close proximity thereto and is in the public interest and would promote the general welfare of the community and that the attached draft ordinance regulating such businesses be adopted.

(Considered by Whittier City Planning Commission, January 9, 1978 and Whittier City Council January 24, 1978)

Supreme Court, U.S.
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No. 85-1116

In The Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF WHITTIER,
a Charter City, et al.,

Appellants,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Appellee.

On Appeal From The United States Court of Appeals For the Ninth Circuit

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MOTION TO AFFIRM

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 551-2923

Of Counsel:

BARRY A. FISHER
Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 557-1077

**Counsel of Record*

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QUESTIONS PRESENTED

1. Whether the district court's critical finding - that the provision of the City's adult business ordinance prohibiting an adult theater from operating within one thousand feet of a church makes it impossible to operate an adult theater in the City - is clearly erroneous.

2. Whether the court of appeals correctly affirmed the district court's judgment declaring the City's Ordinance violative of the First and Fourteenth Amendments to the United States Constitution because it makes it impossible to operate an adult theater in the City.

3. Whether the courts below correctly ruled that neither res judicata nor collateral estoppel applies to this case because:

A. There was no prior final judgment on whether the ordinance is constitutional as applied.

B. There was no prior decision on whether the ordinance had the effect of making it impossible to operate an adult theater in the City.

C. Under California law the state court proceeding is not preclusive.

4. Whether the district court abused its discretion when it exercised the jurisdiction conferred upon it by Congress, to determine whether the City acting under color of law denied appellee its federal constitutional rights.

PARTIES TO THE PROCEEDING

The jurisdictional statement accurately sets forth the parties to the proceedings. Initially Vincent Miranda, then President of Walnut Properties, was a plaintiff. He died after judgment was entered herein.

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On Appeal From The United States Court of Appeals
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MOTION TO AFFIRM

Appellee Walnut Properties, Inc. moves that the final judgment herein be affirmed on the ground that the questions presented by appellants are not substantial, and are not properly before the Court.

COUNTERSTATEMENT OF THE CASE

On May 7, 1981 appellee Walnut Properties, Inc. (Walnut) filed a complaint in the United States District

Court, Central District of California against the City of Whittier, and its officials (City), for declaratory and injunctive relief. Walnut alleged that the City's "adult business" Ordinance, as applied to Walnut's motion picture theater, violated the First and Fourteenth Amendments to the United States Constitution because, inter alia, it had the purpose and effect of greatly restricting the exhibition of non-obscene "adult" motion picture films in the City.

The Ordinance in question - Ordinance No. 2257 - was enacted on March 24, 1981. It prohibited an adult theater from operating, inter alia, within one thousand feet of a church. After trial the district court filed its Findings of Fact and Conclusions of Law, finding that Walnut had the only theater in the City exhibiting adult films; that Ordinance No. 2257 applied to Walnut's theater solely because it is within one thousand feet of a church; and that the Ordinance's provision prohibiting an adult theater from operating within one thousand feet of a church "makes it impossible to operate an adult theater in the central business district of Whittier" and "the Ordinance's effect would then be a total exclusion of adult theaters in Whittier." Appendix to

Jurisdictional Statement, 40a.[1/] The district court entered judgment declaring invalid the portion of Ordinance No. 2257 which prohibits an adult theater from operating within one thousand feet of a church. The court also enjoined the City from initiating any proceedings against Walnut based upon the operation of the theater located at 7028 Greenleaf Avenue, Whittier, California, "solely because it is within one thousand feet of a church." App. 31a-32a[2/]

1/ Reference to the Appendix to the Jurisdictional Statement will be referred to as App. followed by the appropriate page.

2/ In its Findings of Fact and Conclusions of Law the district court also found Ordinance No. 2257 unconstitutional because it was improperly motivated (App. 39a-40a), and because the City had failed to meet the burden of proving that the required separation between a church and an adult theater furthered a compelling government interest unrelated to the suppression of free speech. (App. 38a-39a). The Ninth Circuit agreed. App. 6a, 8a, 12a.

The district court conducted a full evidentiary trial on November 15-16, 1983. Following final argument, the district court orally announced that it intended to find Ordinance No. 2257 unconstitutional insofar as it prohibited an adult theater from operating within one thousand feet of a church because the effect of this provision was to exclude all theaters from the City. At that time the only state court judgment in effect between the parties was the judgment of the superior court holding Ordinance No. 2138 unconstitutional.[3/]

After the district court announced its intended decision, but before it filed its Findings of Fact and Conclusions of Law, the California Court of Appeal rendered a judgment, in December 1983. App. 45a. The California Court of Appeal agreed with the superior court judge, that Ordinance No. 2138 was unconstitutional on its face, because the effect of the Ordinance was to

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3/ On February 1, 1983 the California Court of Appeal did render a judgment (App. 67a) but it was nullified when the California Supreme Court granted a hearing on May 19, 1983. (App. 37a). See, Knouse v. Nimmocks, 8 Cal.2d 482, 483 (1937).

prohibit the operation of any adult business within the City. App. 49a-50a, n.3. Curiously, the California Court of Appeal then decided to consider the validity of Ordinance No. 2257 (App. 49a-50),[4/] the successor to Ordinance No. 2138, and concluded that the Ordinance was constitutional "if it leaves open alternate channels of communication . . . and does not violate the First Amendment." The court went on to state:

> No evidence having been introduced on the crucial issue of the availability of other areas in which a theater might be operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The California Court of Appeal ordered that on remand

> "the trial court shall make the necessary rulings on proffered evidence . . . as to the availability of

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4/ The California Court of Appeal cites the ordinance as No. 2254. That was an emergency ordinance enacted when the superior court judge announced his intention to find Ordinance No. 2138 unconstitutional. No. 2254 became No. 2257, when it became a permanent ordinance.

alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

App. 56a-57a.

The district court fully explained why the state court proceeding was no bar to the exercise of its jurisdiction, (App. 35a-38a)., and concluded:

> The judgment of the state court of appeal, reversing the judgment of the superior court, has not resulted in a judgment on the merits, and res judicata is not applicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provisions of its ordinance prohibiting an adult theater from operating within one thousand feet of a church. Where, as here, plaintiffs preserve their rights to have Federal constitutional claims resolved in Federal court, the Federal court must exercise the jurisdiction entrusted to it by the constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. See Tovar v. Billmeyer, 721 F.2d 1260, 1267 n.8 (9th Cir. 1983).

App. 41a.

The Ninth Circuit held that the district court, had properly exercised its jurisdiction, because under California law the California Court of Appeal judgment would not preclude the litigation which was conducted by the district court. App. 2a-2b, 4a. On the merits the Ninth Circuit found the Ordinance violative of the First and Fourteenth Amendments to the United States Constitution. App. 5a-9a.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

1. The district court's critical finding, that the provision of the City's ordinance prohibiting an adult theater from operating within one thousand feet of a church has the effect of totally excluding adult theaters from the City, is entitled to great deference, and can only be overturned if it is "clearly erroneous." Anderson v. City of Bessemer, 105 S.Ct. 1504 (1985). This critical finding compels a conclusion that the Ordinance is unconstitutional. The Ninth Circuit so held, stating:

> If the Ordinance severely restricts the availability of a form of protected speech in Whittier, it violates the first

> amendment. See, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981); Alexander v. City of Minneapolis, 698 F.2d 936, 938-39 (8th Cir. 1983); Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

App. 7a

2. It is common ground that Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 896-98 (1984).

The City concedes that under California law the district court was free to relitigate the issues remanded by the California Court of Appeal. Juris. Statement at 11-12. The California Court of Appeal remanded to the superior court the issue of alternative sites saying:

> No evidence having been introduced on the critical issue of the availability of other areas in which the theater might be

> operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The City's concession that the district court was free to litigate the issue remanded by the California Court of Appeal is in accord with California law. Bleek v. State Board of Optometry, 18 Cal.App.3d 415, 429 (1971). See also, Perez v. City of San Bruno, 25 Cal.3d 875, 885, 168 Cal.Rptr. 114, 117 (1980); Bernhard v. Bank of America, 19 Cal.2d 807, 810, 122 P.2d 892, 894 (1942).

Since California courts would not afford the judgment of the California Court of Appeal preclusive effect with regard to the question of whether the effect of the Ordinance herein would be the total exclusion of adult theaters from the City, the district court was free to litigate the issue. Migra, supra .

Finally, it should be noted that the City did not raise the res judicata issue when it filed its answer and counterclaim, nor did it raise the issue in the pretrial order. The City first raised res judicata after the district court orally announced its intention to rule in Walnut's favor.

3. The City's argument that the district court should have abstained from exercising its jurisdiction (Juris. Statement 12-14) is meritless. Initially it should be noted that the City filed an answer and counterclaim alleging that Ordinance No. 2257 is constitutional, and asked the district court for a declaration to that effect. Additionally, the City did not raise abstention in the Ninth Circuit. In its Ninth Circuit brief, the City argued only that the decision of the California Court of Appeal is res judicata (Br. for Appellees 11-22) and that the City sustained its burden of proving that the Ordinance furthers substantial governmental interests (Id. at 22 -32).[5/] Because the City did not raise the abstention issue, the court of appeals did not discuss it. In any event, abstention is inappropriate in this case. See, J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir. 1984)

5/ The Brief also challenged the fee award made to Walnut's counsel.

reversed on other grounds. Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). The district court has broad discretion on whether to exercise the jurisdiction conferred upon it by Congress, and the district court's decision will be reversed "only when there has been an abuse of discretion." J-R Distributors, Inc., supra, at 487. The district court did not abuse its discretion in this case.

CONCLUSION

For the aforesaid reasons the court should affirm the judgment below.

DATED: January 17, 1986

Respectfully submitted,

STANLEY FLEISHMAN
A Professional Corporation

By: _____
STANLEY FLEISHMAN
Attorney for Appellee
WALNUT PROPERTIES, INC.

Of Counsel:

BARRY A. FISHER
Fisher & Moest

0865A Sys./0051A Arch.

DECLARATION OF SERVICE BY MAIL

I, VICKI S. BUTLER, declare as follows:

I am a citizen of the United States and am employed in the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067.

On January 24, 1986, I served the within MOTION TO AFFIRM on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Robert Flandrick, City Attorney
City of Whittier
624 S. Grand Avenue, 11th Floor
Los Angeles, California 90017

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 24th day of January, 1986, at Los Angeles, California.

Vicki S. Butler

VICKI S. BUTLER

Supreme Court, U.S.
FILED
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No. 85-1116

In The

Supreme Court of the United States

October Term, 1985

THE CITY OF WHITTIER, a Charter City, *et al.*,

Appellants,

v.

WALNUT PROPERTIES, INC., a California corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Ninth Circuit

BRIEF OPPOSING MOTION TO AFFIRM

BURKE, WILLIAMS & SORENSEN

J. ROBERT FLANDRICK,* CITY ATTORNEY,
CITY OF WHITTIER
KATHERINE E. STONE
BENJAMIN S. KAUFMAN
LISA E. KRANITZ
624 South Grand Avenue
11th Floor
Los Angeles, California 90017
Telephone: (213) 623-1900

Counsel for Appellants

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

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I

WALNUT MISSTATES THE FACTS IN AN ATTEMPT TO STRENGTHEN ITS CASE

Appellee, Walnut Properties, Inc. (hereafter "Walnut"), misstates the facts below, apparently in a futile attempt to bolster its case. Appellant, City of Whittier, *et al.* (hereafter "Whittier"), opposes Walnut's motion to affirm on the grounds that the true facts support the arguments presented in the Jurisdictional Statement and demonstrate that this case presents substantial questions.

Throughout its Brief, Walnut attempts to confuse this Court by implying that the case below concerned only Whittier's Ordinance No. 2257. *E.g.*, Motion to Affirm (hereafter "Walnut's Brief") at 2. It is clear, however, that the district court considered and ruled upon all of Whittier's ordinances which affect adult businesses, i.e., Nos. 2116, 2121, 2128, 2138, 2254, and 2257. App. D, 31a; *see also* App. E, 35a-36a. It is the entire set of Whittier ordinances regulating adult businesses (with the possible exception of Ordinance No. 2327, adopted after the district court's judgment), which are the subject of this suit.[1]

Walnut makes a more serious misstatement of fact in implying that the district court made its decision in this case on November 16, 1983. Walnut's Brief at 4. This is apparently an attempt to counter Whittier's argument of the preclusive effect of the California appellate court decision filed December 8, 1983, by back-dating the district

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[1] Both this Brief and Whittier's Jurisdictional Statement refer to these ordinances collectively as the "Regulations."

court's decision. However, on November 16, 1983, when the parties had finished their closing statements at trial's end, the district court made no other statement than that "[t]he matter will be submitted." Reporter's Transcript ("RT") at 260. It was not until nearly three months later, at a status conference on February 13, 1984, that the district court announced its intended decision. App. E, 38a (Finding of Fact No. 16). Judgment in the case was not entered until March 8, 1984, (App. D, 31a), well after the California appellate court decision became final.

Walnut's most serious misstatement is its claim that the district court's "critical" finding was "that the provision of the City's ordinance prohibiting an adult theater from operating within 1,000 feet of a church has the effect of totally excluding adult theaters from the City." Walnut's Brief at 7. No such finding was ever made by the district court; Walnut misrepresents the court's Finding of Fact No. 20. App. E, 40a.

The "critical" finding made by the district court[2] was that the church separation provision of the Regulations was unconstitutional because there was insufficient evidence in the record to show the justification and compelling state interest necessary to support the provision. *See* App. D, 31a-32a; App. E, 38a-43a (Findings of Fact Nos. 17-19 & Conclusions of Law Nos. 4-5).

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[2] The Findings of Fact and Conclusions of Law were prepared by Walnut's counsel and adopted verbatim by the district court. The danger of this practice was recognized by this court in *Anderson v. Bessemer City*, — U.S. —, 105 S.Ct. 1504 (1985). *See also United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57 (1964).

Other than a finding that the Regulations would ban all adult businesses from Whittier's central business district, the district court's written findings make no reference to the availability of alternative sites. By finding the Regulations constitutional in all other respects, the district court necessarily found that sufficient alternative sites *did* exist within Whittier. Moreover, examination of the trial record shows that contrary to Walnut's assertion, the district court did find that there would be sufficient alternative sites.

The transcript of the trial clearly discloses that the district court relied upon the testimony of Whittier's Planning Director, Mr. Porter, and not, as the Ninth Circuit panel asserted, on Walnut's witness, Mr. Metcalf. *See* App. A, 7a. At the conclusion of the trial, the district court stated that it was required to believe Mr. Porter, when Porter stated that there would be 99.5 acres available for adult businesses to locate within Whittier, because of the maxim that a court is bound by the "interpretation of an ordinance given by the person who has the power to enforce them [sic]." RT at 254, lines 7-9; *see also* RT at 250, lines 12-15 (the court stated that the appellants "are bound by the interpretation that they give, wherever they give it. If they give it to a court, certainly they are bound by that interpretation. . . .").

Walnut misrepresents the findings made by the district court; the district court never made the so-called "critical" finding that there were insufficient alternative sites for adult businesses within Whittier.

II

WALNUT MISTAKENLY STATES THAT THE CLEARLY ERRONEOUS STANDARD APPLIES IN THIS CASE

Walnut appears to contend that the correct standard for this Court to apply is the "clearly erroneous" standard. Walnut's Brief at 7. The determination of the constitutionality of a statute is not a "finding of fact" but an interpretation of law, therefore the proper standard to be applied by this Court is *de novo* review. *See, e.g., United States v. Horowitz*, 756 F.2d 1400, 1403 (9th Cir.), *cert. denied*, —— U.S. ——, 106 S.Ct. 74 (1985); *Dumdeang v. Commissioner of Internal Revenue*, 739 F.2d 452, 453 (9th Cir. 1984); *California Teachers Ass'n. v. San Diego Community College Dist.*, 28 Cal. 3d 692, 699, 170 Cal.Rptr. 817, 621 P.2d 856 (1981).

III

WALNUT MISREPRESENTS THE PROCEEDINGS BELOW WHEN IT ARGUES THAT RES JUDICATA AND ABSTENTION DO NOT APPLY

Walnut claims that Whittier only "first raised *res judicata* after the district court orally announced its intention to rule in Walnut's favor." Walnut's Brief at 9. However, this is not the case. Whittier argued the preclusive effect of the state litigation as soon as that argument became available, and has renewed this issue whenever possible. On December 13, 1983, only five days after the published decision of the California Court of Appeal holding the Regulations valid was filed, Whittier filed a "Motion for Judicial Notice and Motion for Dismissal"

with the district court arguing that in light of the California appellate court's decision the federal litigation should be dismissed. Whittier renewed this motion at the hearing of February 13, 1984, in its objections to Walnut's Findings of Fact and Conclusions of Law, and again before the Ninth Circuit panel. In short, Whittier pursued the issue of the preclusive effect of the California appellate court decision as soon as it became available and has renewed it at every instance.

Walnut cites to *Tovar v. Billmeyer*, 721 F.2d 1260 (9th Cir. 1983) *cert. denied*, — U.S. —, 105 S.Ct. 223 (1984) for its argument that *res judicata* does not apply because where, "as here, plaintiffs preserve their rights to have Federal constitutional claims resolved in Federal court, the Federal court must exercise the jurisdiction entrusted to it. . . ." Walnut's Brief at 6. In *Tovar*, however, the court stated that "a free and unreserved submission to the state court of all federal claims for complete and final resolution is necessary to bar return to the federal court." *Tovar*, 721 F.2d at 1267 n.8 (quoting from *Tovar v. Billmeyer*, 609 F.2d 1291, 1293-94 (9th Cir. 1980)). In this case, Walnut has made this "free and unreserved submission" of all federal questions in the state court proceeding and these federal questions have been adjudged by the California courts. *See* App. J, 85a (Finding of Fact No. 6, prepared by counsel for Walnut, stating that all federal claims were presented in the state court proceedings); App. F, 45a-63a. In *Tovar*, the adult business owners purposely did not litigate their federal claims in state court in order to reserve federal jurisdiction; by contrast, in this case, Walnut has had two forums to litigate its federal claims—California state courts and the federal courts.

Similarly, Walnut misstates both the facts and the law in discussing *Younger* abstention.[3] Walnut states that abstention is inappropriate because Whittier filed an answer and counterclaim asking the district court to declare the Regulations constitutional. Walnut's Brief at 10. Walnut fails to inform this Court that Whittier's answer and counterclaim was filed on March 31, 1983, almost two years after Whittier filed its "Motion to Dismiss or Alternatively to Stay Action," wherein Whittier argued under *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) that abstention was required. This motion was filed in the district court on July 6, 1981. It is only because the district court orally denied Whittier's motion to abstain that an answer was filed.[4] *See* App. E, 40a (Conclusion of Law No. 2).

Moreover, the single case cited by Walnut on the issue of abstention does not apply the *Younger* doctrine. Rather, *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 487-88 (9th Cir. 1984), *rev'd on other grounds, Brockett v. Spokane Arcades, Inc.*, — U.S. —, 105 S.Ct. 2794 (1985), held that abstention under the doctrine of *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) was inappropriate. On the issue raised in this case, the question of

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[3] Walnut mistakenly states that Whittier "concedes that under California law the district court was free to relitigate the issues remanded by the California Court of Appeal." Walnut's Brief at 8. Actually, Whittier asserts that the district court was required to dismiss this case under the doctrine of *Younger* abstention, and was not "free" to litigate any issues.

[4] It should also be noted that Whittier set forth as an affirmative defense in its answer that: "This Court lacks subject matter jurisdiction as to the purported claims set forth in the Plaintiff's [sic] Complaint." Answer at 3, lines 20-21.

whether abstention is appropriate under *Younger v. Harris*, 401 U.S. 37 (1971) and its progeny, the court in *J-R Distributors* stated:

> "It is not necessary to decide whether this is the type of case in which *Younger* abstention might otherwise be appropriate. . . ." 725 F.2d at 488-89 n.6.

Finally, while Walnut boldly asserts that the abstention issue is meritless by claiming that Whittier did not raise that issue before the Ninth Circuit panel, Walnut does not attempt to distinguish this Court's holding in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 599 (1975), that *Younger* abstention may be considered for the first time before this Court because of its quasi-jurisdictional nature.

———o———

CONCLUSION

For the reasons stated herein, Whittier submits that the Motion to Affirm is meritless and in no way contradicts Whittier's showing that the issues presented by this case are substantial. Whittier therefore again submits that a plenary hearing should be held on this matter.

Should this Court choose not to grant plenary review or summary reversal in this case, it should be noted that the issues involved as to the constitutionality of the Regulations are factually similar and legally identical to the issues involved in the *Renton* appeal. *City of Renton v. Playtime Theatres, Inc.*, No. 84-1360, *decision below*, 748 F.2d 527 (9th Cir. 1984). This Court should therefore hold this case until it decides *Renton* and, at the very least, reverse the Ninth Circuit panel's decision and re-

mand this case for reconsideration in light of this Court's decision in *Renton*.

Respectfully submitted,

BURKE, WILLIAMS & SORENSEN

J. ROBERT FLANDRICK, CITY ATTORNEY,
CITY OF WHITTIER
KATHERINE E. STONE
BENJAMIN S. KAUFMAN
LISA E. KRANITZ

Counsel for Appellants
THE CITY OF WHITTIER, a
Charter City, et al.

(5)

No. 85-1116

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1985

THE CITY OF WHITTIER,
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Appellants,

v.

WALNUT PROPERTIES, INC.,
a California corporation,

Appellee.

On Appeal From The United States Court of Appeals For the Ninth Circuit

---

MOTION TO AFFIRM

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 551-2923

Of Counsel:

BARRY A. FISHER
Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 557-1077

**Counsel of Record*

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MOTION TO AFFIRM

STANLEY FLEISHMAN*
A Professional Corporation
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 551-2923

Of Counsel:

BARRY A. FISHER
Fisher & Moest
2049 Century Park East
Suite 3160
Los Angeles, CA 90067
Telephone: (213) 557-1077

*Counsel of Record

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QUESTIONS PRESENTED

1. Whether the district court's critical finding - that the provision of the City's adult business ordinance prohibiting an adult theater from operating within one thousand feet of a church makes it impossible to operate an adult theater in the City - is clearly erroneous.

2. Whether the court of appeals correctly affirmed the district court's judgment declaring the City's Ordinance violative of the First and Fourteenth Amendments to the United States Constitution because it makes it impossible to operate an adult theater in the City.

3. Whether the courts below correctly ruled that neither res judicata nor collateral estoppel applies to this case because:

A. There was no prior final judgment on whether the ordinance is constitutional as applied.

B. There was no prior decision on whether the ordinance had the effect of making it impossible to operate an adult theater in the City.

C. Under California law the state court proceeding is not preclusive.

4. Whether the district court abused its discretion when it exercised the jurisdiction conferred upon it by Congress, to determine whether the City acting under color of law denied appellee its federal constitutional rights.

PARTIES TO THE PROCEEDING

The jurisdictional statement accurately sets forth the parties to the proceedings. Initially Vincent Miranda, then President of Walnut Properties, Inc. was a plaintiff. He died after judgment was entered herein.

Walnut Properties, Inc. has no parent company nor does it have any subsidiaries or affiliates.

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MOTION TO AFFIRM

Appellee Walnut Properties, Inc. moves that the final judgment herein be affirmed on the ground that the questions presented by appellants are not substantial, and are not properly before the Court.

COUNTERSTATEMENT OF THE CASE

On May 7, 1981 appellee Walnut Properties, Inc. (Walnut) filed a complaint in the United States

District Court, Central District of California against the City of Whittier, and its officials (City), for declaratory and injunctive relief. Walnut alleged that the City's "adult business" Ordinance, as applied to Walnut's motion picture theater, violated the First and Fourteenth Amendments to the United States Constitution because, inter alia, it had the purpose and effect of greatly restricting the exhibition of non-obscene "adult" motion picture films in the City.

The Ordinance in question - Ordinance No. 2257 - was enacted on March 24, 1981. It prohibited an adult theater from operating, inter alia, within one thousand feet of a church. After trial the district court filed its Findings of Fact and Conclusions of Law, finding that Walnut had the only theater in the City exhibiting adult films; that Ordinance No. 2257 applied to Walnut's theater solely because it is within one thousand feet of a church; and that the Ordinance's provision prohibiting an adult theater from operating within one thousand feet of a church "makes it impossible to operate an adult theater in the central business district of Whittier"

and "the Ordinance's effect would then be a total exclusion of adult theaters in Whittier." Appendix to Jurisdictional Statement, 40a.[1/] The district court entered judgment declaring invalid the portion of Ordinance No. 2257 which prohibits an adult theater from operating within one thousand feet of a church. The court also enjoined the City from initiating any proceedings against Walnut based upon the operation of the theater located at 7028 Greenleaf Avenue, Whittier, California, "solely because it is within one thousand feet of a church." App. 31a-32a[2/]

1/ Reference to the Appendix to the Jurisdictional Statement will be referred to as App. followed by the appropriate page.

2/ In its Findings of Fact and Conclusions of Law the district court also found Ordinance No. 2257 unconstitutional because it was improperly motivated (App. 39a-40a), and because the City had failed to meet the burden of proving that the required separation between a church and an adult theater furthered a compelling government interest unrelated to the suppression of free speech. (App. 38a-39a). The Ninth Circuit agreed. App. 6a, 8a, 12a.

The district court conducted a full evidentiary trial on November 15-16, 1983. Following final argument, the district court orally announced that it intended to find Ordinance No. 2257 unconstitutional insofar as it prohibited an adult theater from operating within one thousand feet of a church because the effect of this provision was to exclude all theaters from the City. At that time the only state court judgment in effect between the parties was the judgment of the superior court holding Ordinance No. 2138 unconstitutional.[3/]

After the district court announced its intended decision, but before it filed its Findings of Fact and Conclusions of Law, the California Court of Appeal rendered a judgment, in December 1983. App. 45a. The California Court of Appeal agreed with the superior court judge, that Ordinance No. 2138 was unconstitutional on its face, because the effect of

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3/ On February 1, 1983 the California Court of Appeal did render a judgment (App. 67a) but it was nullified when the California Supreme Court granted a hearing on May 19, 1983. (App. 37a). See, Knouse v. Nimmocks, 8 Cal.2d 482, 483 (1937).

the Ordinance was to prohibit the operation of any adult business within the City. App. 49a-50a, n.3. Curiously, the California Court of Appeal then decided to consider the validity of Ordinance No. 2257 (App. 49a-50),[4/] the successor to Ordinance No. 2138, and concluded that the Ordinance was constitutional "if it leaves open alternate channels of communication . . . and does not violate the First Amendment." The court went on to state:

> No evidence having been introduced on the crucial issue of the availability of other areas in which a theater might be operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The California Court of Appeal ordered that on remand

> "the trial court shall make the necessary rulings on proffered evidence . . . as to the availability of

---

4/ The California Court of Appeal cites the ordinance as No. 2254. That was an emergency ordinance enacted when the superior court judge announced his intention to find Ordinance No. 2138 unconstitutional. No. 2254 became No. 2257, when it became a permanent ordinance.

> alternate sites in the City of Whittier, and enter judgment in accordance with this opinion and such additional findings."

App. 56a-57a.

The district court fully explained why the state court proceeding was no bar to the exercise of its jurisdiction, (App. 35a-38a)., and concluded:

> The judgment of the state court of appeal, reversing the judgment of the superior court, has not resulted in a judgment on the merits, and res judicata is not applicable to this case. No state tribunal has taken evidence on whether the City adequately justified the provisions of its ordinance prohibiting an adult theater from operating within one thousand feet of a church. Where, as here, plaintiffs preserve their rights to have Federal constitutional claims resolved in Federal court, the Federal court must exercise the jurisdiction entrusted to it by the constitution and laws of the United States. The state proceedings relied upon by the defendants herein do not justify stripping the court of its proper jurisdiction. See Tovar v. Billmeyer, 721 F.2d 1260, 1267 n.8 (9th Cir. 1983).

App. 41a.

The Ninth Circuit held that the district court, had properly exercised its jurisdiction, because under California law the California Court of Appeal judgment would not preclude the litigation which was conducted by the district court. App. 2a-2b, 4a. On the merits the Ninth Circuit found the Ordinance violative of the First and Fourteenth Amendments to the United States Constitution. App. 5a-9a.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

1. The district court's critical finding, that the provision of the City's ordinance prohibiting an adult theater from operating within one thousand feet of a church has the effect of totally excluding adult theaters from the City, is entitled to great deference, and can only be overturned if it is "clearly erroneous." Anderson v. City of Bessemer, 105 S.Ct. 1504 (1985). This critical finding compels a conclusion that the Ordinance is unconstitutional. The Ninth Circuit so held, stating:

> If the Ordinance severely restricts the availability of

> a form of protected speech in Whittier, it violates the first amendment. See, Schad v. Borough of Mount Ephraim, 452 U.S. 61, 76 (1981); Alexander v. City of Minneapolis, 698 F.2d 936, 938-39 (8th Cir. 1983); Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982). The district court found that the church provision "makes it impossible to operate an adult theater in the central business district of Whittier" and that "the ordinance's effect would then be a total exclusion of adult theaters in . . . Whittier."

App. 7a

2. It is common ground that Federal courts must accord a state court judgment the same preclusive effect the judgment would receive in the courts of that state. Migra v. Warren City School District Board of Education, 104 S.Ct. 892, 896-98 (1984).

The City concedes that under California law the district court was free to relitigate the issues remanded by the California Court of Appeal. Juris. Statement at 11-12. The California Court of Appeal remanded to the superior court the issue of alternative sites saying:

> No evidence having been introduced on the critical issue of the availability of other areas in which the theater might be operated, the matter must be remanded for a hearing and determination of that issue.

App. 53a.

The City's concession that the district court was free to litigate the issue remanded by the California Court of Appeal is in accord with California law. Bleek v. State Board of Optometry, 18 Cal.App.3d 415, 429 (1971). See also, Perez v. City of San Bruno, 25 Cal.3d 875, 885, 168 Cal.Rptr. 114, 117 (1980); Bernhard v. Bank of America, 19 Cal.2d 807, 810, 122 P.2d 892, 894 (1942).

Since California courts would not afford the judgment of the California Court of Appeal preclusive effect with regard to the question of whether the effect of the Ordinance herein would be the total exclusion of adult theaters from the City, the district court was free to litigate the issue. Migra, supra .

Finally, it should be noted that the City did not raise the res judicata issue when it filed its answer and counterclaim, nor did it raise

the issue in the pretrial order. The City first raised res judicata after the district court orally announced its intention to rule in Walnut's favor.

3. The City's argument that the district court should have abstained from exercising its jurisdiction (Juris. Statement 12-14) is meritless. Initially it should be noted that the City filed an answer and counterclaim alleging that Ordinance No. 2257 is constitutional, and asked the district court for a declaration to that effect. Additionally, the City did not raise abstention in the Ninth Circuit. In its Ninth Circuit brief, the City argued only that the decision of the California Court of Appeal is res judicata (Br. for Appellees 11-22) and that the City sustained its burden of proving that the Ordinance furthers substantial governmental interests (Id. at 22 -32).[5/] Because the City did not raise the abstention issue, the court of appeals did not discuss it. In any event, abstention is inappropriate in this case. See, J-R Distributors, Inc. v. Eikenberry, 725 F.2d 482, 487-88 (9th Cir.

5/ The Brief also challenged the fee award made to Walnut's counsel.

1984) reversed on other grounds. Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985). The district court has broad discretion on whether to exercise the jurisdiction conferred upon it by Congress, and the district court's decision will be reversed "only when there has been an abuse of discretion." J-R Distributors, Inc., supra, at 487. The district court did not abuse its discretion in this case.

CONCLUSION

For the aforesaid reasons the court should affirm the judgment below.

DATED: February 3, 1986

Respectfully submitted,

STANLEY FLEISHMAN
A Professional Corporation

By: _____
STANLEY FLEISHMAN
Attorney for Appellee
WALNUT PROPERTIES, INC.

Of Counsel:

BARRY A. FISHER
Fisher & Moest

0865A Sys./0052A Arch.

DECLARATION OF SERVICE BY MAIL

I, VICKI S. BUTLER, declare as follows:

I am a citizen of the United States and am employed in the County of Los Angeles. I am over the age of eighteen years and not a party to the within entitled action. My business address is 2049 Century Park East, Suite 3160, Los Angeles, California 90067.

On February 4, 1986, I served the within MOTION TO AFFIRM on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

J. Robert Flandrick, City Attorney
City of Whittier
624 S. Grand Avenue, 11th Floor
Los Angeles, California 90017

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct and that this declaration is executed this 4th day of February, 1986, at Los Angeles, California.

Vicki S. Butler

VICKI S. BUTLER

Supreme Court, U.S.
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BRIEF OF AMICI CURIAE CITY OF OCEANSIDE, CALIFORNIA AND 74 JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

CHARLES R. REVLETT*
CITY ATTORNEY, CITY OF OCEANSIDE
321 North Nevada Street
Oceanside, California 92054
Telephone: (619) 439-7306

WILLIAM J. ADAMS
City Attorney, City of Palm Springs

GEORGE AGNOST
City Attorney,
BURK E. DELVENTHAL,
Deputy City Attorney,
City of San Francisco

ROBERT K. BOOTH, JR.
City Attorney, City of Los Altos

ROBERT BURNHAM
City Attorney, City of Newport Beach

JOHN R. CALHOUN
City Attorney, City of Long Beach

WILLIAM CAMIL
City Attorney, Cities of Commerce,
Duarte and Santa Fe Springs

DAVID R. CHAPMAN
City Attorney, City of Escondido

J. DENNIS CRABB
City Attorney, City of South Lake Tahoe

LELAND C. DOLLEY
City Attorney, Cities of Alhambra,
El Segundo and Lomita

DAVID J. ERWIN
City Attorney, Cities of Coachella,
Indio and Palm Desert

BERT GLENNON, JR.
City Attorney, City of Culver City

KENNETH HAHN, City Attorney,
CLAUDE HILKER, Chief Assistant
City Attorney,
CLAUDIA McGEE HENRY, Assistant
City Attorney,
City of Los Angeles

**Counsel of Record*

Westside Law Publishers Los Angeles, California (213) 477-0491

JEAN HARRIS
City Attorney, City of Rancho Mirage

RANDALL A. HAYS
City Attorney, City of Redding

DOUGLAS C. HOLLAND
City Attorney, City of Burbank

DALLAS HOLMES
City Attorney, Cities of Corona and Redlands

JAMES P. JACKSON
City Attorney, City of Sacramento

LELAND JORDAN
City Attorney, Cities of Fairfax, Mill Valley and Sausalito

DAVID M. KENNEDY
City Attorney, City of Salinas

ROBERT KOCH
City Attorney, City of Rialto

LINNIE KRAMER
City Attorney, City of Vacaville

DENNIS LEE
City Attorney, City of Pleasant Hill

COLIN LENNARD
City Attorney, Cities of Camarillo and West Covina

K. DUANE LYDERS
City Attorney, City of Oxnard

SIDNEY MALECK
City Attorney, City of El Monte

FRANK R. MANZANO
City Attorney, City of Glendale

WILLIAM MARSH
City Attorney, City of Monterey

CHARLES MARTIN
City Attorney, Cities of Irwindale, Sierra Madre and Temple City

JAMES A. MCKELVEY
City Attorney, City of Fresno

DONALD F. MCLEAN
City Attorney, City of Lemon Grove

GLORIA F. MCLEAN
City Attorney, City of Santee

MICHAEL H. MILLER
City Attorney, City of Arcadia

ARTHER R. MONTANDON
City Attorney, City of Santa Maria

EDWIN J. MOORE
City Attorney, City of Santa Clara

CARL K. NEWTON
City Attorney, Cities of Downey and Manhattan Beach

STEVEN F. NORD
City Attorney, City of Merced

RICHARD J. OBERHOLZER
City Attorney, City of Bakersfield

MAURICE O'SHEA
City Attorney, Cities of Bellflower, Hawaiian Gardens and Paramount

RAYMOND E. OTT
City Attorney, City of Cathedral City

RALPH H. PRINCE
City Attorney, City of San Bernardino

STANLEY E. REMELMEYER
City Attorney, City of Torrance

JAMES G. ROURKE
City Attorney, City of Tustin

PATRICK J. SAMPSON
City Attorney, City of Pomona

KENNETH C. SCHEIDIG
City Attorney, City of Concord

ELWAYNE E. SMITH
City Attorney, City of Huntington Park

GERALD A. SPERRY
City Attorney, City of Stockton

ALLEN E. SPRAGUE
City Attorney, City of Fremont

RONALD M. STEIN
City Attorney, City of Lodi

CARTER STROUD
City Attorney, City of Alameda

BETSY STRAUSS
City Attorney, City of Napa

PETER M. THORSON
City Attorney, City of Azusa

NATALIE E. WEST
City Attorney, City of Novato

JACK L. WHITE
City Attorney, City of Anaheim

JOHN W. WITT
City Attorney, City of San Diego

JOHN WOODHEAD
City Attorney, City of Riverside

STEVEN A. AMERIKANER
City Attorney, City of Santa Barbara

ROBERT I. CONN
Town Attorney, Town of Tiburon

GARY T. RAGGHIANTI
City Attorney, Cities of Belvedere and San Rafael

Attorneys for Amici Curiae

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BRIEF OF AMICI CURIAE CITY OF OCEANSIDE, CALIFORNIA AND 74 JOINING CALIFORNIA CITIES IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

This Brief is filed pursuant to Rule 36.4 of this Court.

STATEMENT OF THE CASE

Amici Curiae, the City of Oceanside, *et al.*,[1] adopt in full the Statement of the Case made by Appellants, the City of Whittier, *et al.* (hereinafter "Whittier").

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[1]Appendix A hereto sets forth those California cities joining in this Brief.

INTERESTS OF THE AMICI

Whittier's adult business regulations, which are the subject of this appeal, are by no means unique. Many California cities have been impacted with the secondary effects of adult businesses. In light of this Court's opinion in *Young v. American Mini Theatres*, 427 U.S. 50 (1976), most of these cities have adopted ordinances regulating the location of adult businesses in an attempt to control the associated secondary effects.

The need of California cities to legislate for legitimate governmental interests is being frustrated by the Ninth Circuit, as demonstrated by its decision in this case. The secondary effects of concentrations of adult businesses include increased crime, lowering of property values and harmful effects on children. These are all legitimate significant interests which cities are required to address by use of their police powers. As this Court has noted, the exercise of reserved police powers by a city,

> "is not confined to the elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

Orderly planning is vital to California cities. Each city is required to prepare a General Plan regulating all future growth within the city. Cal. Gov't Code §§ 65300-66403.

The Ninth Circuit has systematically invalidated adult business regulations. The court has required these type of regulations to jump hurdles which are faced by no other legislation involving First Amendment rights. Because the Ninth Circuit has elevated the rights afforded

to adult businesses over all other land uses, including general audience theaters, California cities, as represented by *Amici*, have been unable to fulfill their obligations toward their citizens.

Amici are particularly concerned because this case involves a "secret" opinion of a federal court overruling a published and presumably reliable California appellate court decision. Conventional wisdom is that the Ninth Circuit's unpublished opinion affects only the parties in the case. *Amici* dispute this contention. While *Amici* have strong concerns in general concerning decisions not to publish opinions, they are particularly concerned in this case because the Ninth Circuit's opinion has left California cities unable to rely upon the final published decisions of their own State appellate courts.

It is unusual for a Ninth Circuit opinion as lengthy as the one in this case to go unpublished. A recent study indicates that almost 85% of Ninth Circuit unpublished opinions are less than 500 words in length. Reynolds & Richmond, *An Evaluation of Limited Publication in The United States Courts of Appeals: The Price of Reform*, 48 U. Chi. L. Rev. 573, 599 (1981). Professors Reynolds and Richmond suggest three pertinent reasons why this Court should be concerned over the Ninth Circuit's decision not to publish its opinion in this case. First, judicial responsibility "may be diminished if courts use the non-publication list as a respository [sic] for troublesome cases presenting issues the court does not wish to address in public." *Id.* at 581. Second, "non-publication may permit judges to approach their jobs more routinely, without the real thought and effort their precedential decision making requires." *Id.* Finally, because an unpublished opinion is less likely to be reviewed by this Honorable Court, "a court of appeal that recognizes this may avoid review of its decisions

by not publishing them." Reynolds & Richmond, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 Colum. L. Rev. 1167, 1203 & n.175 (1978).

It should be noted that the Ninth Circuit determined that the issues presented by ordinances regulating the locations of adult businesses were sufficiently important that the three other such cases considered by the court over the last two years were published. *Ebel v. City of Corona*, 767 F.2d 635 (9th Cir. 1985); *Adultworld Bookstore v. City of Fresno*, 758 F.2d 1348 (9th Cir. 1985); *Playtime Theaters, Inc. v. City of Renton*, 748 F.2d 527 (9th Cir.), *probable juris. noted*, ___ U.S. ___, 105 S.Ct. 2015 (1984). It should also be noted that Whittier made a formal request, pursuant to Rule 21(d) of the Ninth Circuit, to have the court's opinion published (Appendix B hereto), which is unusual for a losing party, but the panel denied the request (Appendix C hereto).

Cities across California, as represented by *Amici*, are of the firm opinion that this Court should consider the appeal by Whittier in order to correct a dangerous trend in the Ninth Circuit and other lower federal courts to severely curtail the zoning power to regulate the location of adult businesses, and to instruct the lower federal courts on the need to respect state court processes.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Ninth Circuit panel did not follow California law when it refused to give preclusive effect to the decision of the California Court of Appeal in *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983). The appellate court decision held Whittier's regulations to be facially valid, and remanded the case on only the question of whether the

ordinance failed to provide for sufficient alternative locations for adult businesses, and was therefore unconstitutional as applied. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981). The Ninth Circuit's failure to respect this decision of a state appellate court enables entrepreneurs like Walnut to have two opportunities, one in federal court and one in state court, to have an ordinance or statute held unconstitutional. Such an outcome should not be countenanced in our federalist system.

2. This case also is an appropriate case for abstention pursuant to *Younger v. Harris*, 401 U.S. 37 (1971), and its progeny. Because the California Legislature has mandated that cities adopt zoning plans to protect their citizens' health, safety and general welfare, regulation of the location of adult businesses clearly "implicates important state interests." *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982). The state court proceeding, involving the same parties and identical issues as this case, was filed two years before the federal case. In that the state proceedings here commenced before the federal proceedings, and the state court proceedings offer an adult business an adequate opportunity to raise all federal constitutional challenges, abstention is clearly warranted. The federal court's failure to abstain in this case is contrary to the principles of equity, comity and the doctrine of federalism. Moreover, refusal by the federal courts to abstain in this case would sanction tactics by which businesses such as Walnut can forum-shop for the court most favorable to their claims.[2]

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[2]This is not the only case where Walnut has employed this tactic. *See Walnut Properties, Inc. v. City Council of the City of Long Beach*, 100 Cal.App.3d 1018, 161 Cal.Rptr. 411, *cert. denied*, 449 U.S. 836 (1980); *Walnut Properties, Inc. v. Long Beach*, No. 81-942-LJH (C.D. Cal. 1981), *aff'd.*, No. 81-5732 (9th Cir. 1982).

3. The Ninth Circuit held Whittier's regulations invalid because it found "*a* motivating purpose" for their enactment was to suppress constitutionally protected speech. In so holding, the court ignored the results of a seven month study demonstrating serious deleterious effects caused by the concentration of adult businesses in Whittier. Courts should not speculate as to legislative motive, as this is "a hazardous matter." *United States v. O'Brien*, 391 U.S. 367, 383 (1968). This is particularly true in this case where the Ninth Circuit based its finding of improper motive on a statement made three years after the adoption of the regulations by a city employee, not a legislator, in a deposition.

4. The Ninth Circuit did not allow Whittier to rely on the extensive experience of other cities in enacting its adult business regulations. Moreover, the court found that the City had presented "no evidence" that it had a legitimate interest in adopting the regulations, despite the fact that a seven month study was conducted which demonstrated that significant secondary effects existed within Whittier, because of the concentration of thirteen adult businesses.

Amici submit that sufficient studies of secondary effects caused by concentrations of adult businesses have been conducted by cities and communities in the United States so as to make these deleterious effects a matter which can be judicially noticed. This Court should not require cities to "reinvent the wheel" to demonstrate that there is a legitimate need to adopt regulations to reduce the secondary effects caused by concentrations of adult businesses. *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 455, 187 Cal.Rptr. 154, 158-59 (1982).

5. The Ninth Circuit found that there were inadequate alternative sites for adult businesses to locate

within Whittier. In so doing, the court held that the City was required to allow adult businesses to locate in the City's central business district, despite the fact that no other First Amendment protected activities are given such a privilege. Moreover, the Ninth Circuit granted Walnut more than equal protection, in that by finding that no alternative sites existed due to the assumption that landlords would be unwilling to rent to an adult business, the court made Whittier responsible for market forces which are beyond its control.

This case presents substantial issues as to the need to instruct the federal judiciary to respect both state judicial processes and legislative processes. It is deserving of a full review before this Honorable Court.

ARGUMENT

1. THIS CASE DEMONSTRATES AN ABUSE BY THE FEDERAL COURTS OF THE CONCEPTS OF EQUITY, COMITY AND FEDERALISM

A. The Decision Below Is Contrary To The Doctrines Of Res Judicata And Collateral Estoppel.

On April 30, 1979, Whittier filed an action for injunctive relief against Walnut in California Superior Court. Whittier sought by this action to abate the use of the Wardman Theatre, owned by Walnut, as an adult business. Walnut's use of the Theatre was made a nonconforming use by adoption of Whittier's adult business regulations. Following the expiration of the amortization period, which reflects the property owner's investment in the nonconforming use, Whittier had issued an order of abatement, and the state action followed to enforce this abatement order by injunction.[3] This case wound its way through the Superior Court, the Court of Appeal, the California Supreme Court, and finally back to the Court of Appeal, which on December 8, 1983, published an opinion holding the regulations facially valid. *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d 633, 197 Cal.Rptr. 127 (1983). Walnut's petition for rehearing in the appellate court was denied January 3, 1984, and its petition for a hearing by the California Supreme Court was denied

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[3]California cases "have firmly held zoning legislation may validly provide for the eventual termination of nonconforming property uses. . . ." *Castner v. City of Oakland*, 129 Cal.App.3d 94, 96, 180 Cal.Rptr. 682, 684 (1982) (court approved amortization period to terminate nonconforming adult entertainment use); *see also National Advertising Co. v. County of Monterey*, 1 Cal.3d 875, 880, 464 P.2d 33, 39, 83 Cal.Rptr. 577, 582 (1970); *City of Los Angeles v. Gage*, 127 Cal.App.2d 442, 453, 274 P.2d 34, 41 (1954).

February 2, 1984. *Id.* at 649, 197 Cal.Rptr. at 137. Walnut did not seek review of the court's decision before this Court.

Judgment in the federal district court was not entered until March 8, 1984, well after the state court decision was final.

The California Court of Appeal was forced to remand the case for further proceedings, because the trial court, in holding the regulations facially unconstitutional, did not address two issues, although testimony was proffered. Because the trial court had failed to decide the issue of the availability of other areas in which adult businesses might be operated (an "as applied" issue), "the matter [was] remanded for a hearing and determination on that issue." *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d at 642, 197 Cal.Rptr. at 133.

In addition, the case was remanded to determine whether Walnut operated an "adult theatre" within the meaning of Whittier's regulations. Because the trial court had found the regulations facially unconstitutional, it did not make a finding on this issue, and under then California law, the failure to make such a finding required the case to be remanded.[4] On all other issues, the appellate court made final rulings.

Despite the state appellate court's opinion, the Ninth Circuit held that the doctrine of res judicata was inapplicable since the case was remanded for trial.

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[4]The appellate court's decision makes it clear what finding the trial court must make. It states: "[o]n the record the only finding could be adverse to respondent [Walnut], but it is entitled to have one made. On remand, the trial court shall make the required finding." *City of Whittier v. Walnut Properties, Inc.*, 149 Cal.App.3d at 643, 197 Cal.Rptr. at 134.

However, California law holds otherwise.[5] In ruling that no final judgment exists whenever an appellate court orders a case remanded, the Ninth Circuit elevated form over substance, contrary to California law. *Stromer v. Browning*, 268 Cal.App.2d 513, 518-19, 74 Cal.Rptr. 155, 160 (1968). When read as a whole, the clear intent of the California appellate court was to decide all issues before it except for the two issues remanded. Under California law, the opinion of the Court of Appeal is res judicata, even though a limited rehearing was ordered. *Beverly Hills Nat. Bank v. Glynn*, 16 Cal.App.3d 274, 288, 93 Cal.Rptr. 907, 915-16 (1971).

The cases cited by the Ninth Circuit are not to the contrary. *NAACP v. Los Angeles Unified School District*, 518 F.Supp. 1053, 1058 (C.D. Cal. 1981), *rev'd on other grounds*, 714 F.2d 946 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 2398 (1984), quotes from *Stromer v. Browning*, wherein the court states that "the fact that the rule we discuss is a 'general' rule implies that it has limitations." 268 Cal.App.2d at 518, 74 Cal.Rptr. at 158. The other case cited by the Ninth Circuit, *Aurora City v. West*, 74 U.S. (7 Wall.) 82 (1868), in fact supports Whittier's position. The Court's decision only restates the common law rule that a final judgment must exist for a decision to be a bar of a subsequent action, and that "where the action was discontinued, or the plaintiff became nonsuit, or where from any other cause, except perhaps in the case of a *retraxit*, no judgment or decree was rendered in the case, then proceedings are not conclusive." *Id.* at 93 (footnote omitted). Because there is a final judgment of a state

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[5]Federal courts must give the California appellate court's opinion the same preclusive effect as would be given the opinion under California law. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984).

appellate court, which has preclusive effect under California law, Whittier is correct in asserting that res judicata applies.

Moreover, the decision of the California Court of Appeal must be given preclusive effect under the doctrine of collateral estoppel or issue preclusion.[6] In *Sandoval v. Superior Court,* 140 Cal.App.3d 932, 190 Cal.Rptr. 29 (1983), the court held that a decision may be "final" for issue preclusion purposes even though it is not final for res judicata or claim preclusion purposes. *Id.* at 936, 190 Cal.Rptr. at 31. The court stated that:

> "for purposes of *issue preclusion* (as distinguished from merger and bar), 'final judgment' includes any prior adjudication of an issue in another action that is determined to be *sufficiently firm to be accorded conclusive effect." Id.* (emphasis in original) (quoting from Restatement (Second) of Judgments, § 13 (1982)).

The court endorsed the reasoning of the Restatement that:

> "To hold invariably that that kind of carry-over is not permitted until a final judgment in the strict sense has been reached in the first action can involve hardship—either needless duplication of effort and expense in the second action to decide the same issue. . . ." *Id.*

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[6]In discussing collateral estoppel, or issue preclusion, *Amici* are not enlarging the issues before this Court. Appellants' "Questions Presented" expresses the issue before the Court as one of whether "preclusive effect" should be given where a state appellate court's published decision is final before the federal district court enters its judgment. Jurisdictional Statement at *i.* As this Court has often noted, the terms res judicata and collateral estoppel have conflicting definitions, and it is thus better to use the term preclusive effect. *See, e.g., Migra,* 465 U.S. at 77 n.1.

In holding that the California Court of Appeal's published decision has no preclusive effect, the Ninth Circuit ignored the clear intent of the state court opinion, and in effect rendered six years of litigation null and void. This Honorable Court should accept jurisdiction in this case to clarify this misapplication of California law and avoid the double litigation which the Ninth Circuit's decision will otherwise engender.

B. The Federal Courts' Failure To Abstain Is Inconsistent With The Doctrine Of *Younger v. Harris.*

The federal district court held that abstention was not warranted in this case. App. 84a. This holding is inconsistent with this Honorable Court's decision in *Younger v. Harris,* 401 U.S. 37 (1971), and its progeny.

In *Younger*, this Court stated that federal interference with on-going state criminal proceedings violates not only traditional notions of equity, but also the,

> "even more vital consideration, the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, in a continuance of a belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for a lack of a better and clearer way to describe it, is referred to by many as 'our Federalism.' " *Id.* at 44.

The *Younger* abstention doctrine has subsequently been extended to on-going state civil proceedings which involve important state interests.[7]

[7] *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Juidice v. Vail*, 430 U.S. 327 (1977); *Trainor v. Hernandez*, 431 U.S. 434 (1977);

Under the test enunciated by this Court in *Middlesex County*, there is no question that this is an appropriate case for *Younger* abstention because the issues "implicate important state interests." *Middlesex County*, 457 U.S. at 432. Whittier has a recognized obligation to its citizens which requires it to regulate the location of adult businesses within the City. *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976); *Central Avenue News, Inc. v. City of Minot, N.D.*, 651 F.2d 565, 568 (8th Cir. 1981). Moreover, the state court litigation was on-going prior to filing of the federal action, and Walnut had the opportunity in the state action to raise all of its federal claims (and in fact raised each of the issues which were relitigated in this case). "No more is required to invoke *Younger* abstention." *Juidice v. Vail*, 430 U.S. 327, 337 (1977).

2. THE NINTH CIRCUIT HAS ERECTED THREE VIRTUALLY INSURMOUNTABLE BARRIERS TO ZONING ADULT BUSINESSES

A. Statements By Whittier's Planning Director Are Insufficient To Demonstrate That Whittier's Regulations Were Adopted To Suppress Protected Speech.

The Ninth Circuit based its holding of improper motivation upon deposition testimony given by Mr. Porter, the City Planning Director. App. 8a. However, review of Mr. Porter's deposition testimony indicates that the line of questioning was not concerning motive, but rather the justification for the provision.[8] The district

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Moore v. Simms, 442 U.S. 415 (1979); *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

[8]The following portions of Porter's deposition were read into the record at the trial:

court clearly held that this deposition testimony went to the issue of justification, and not to the issue of motive. App. 39a-40a.

"Question: What is the justification, if any, for prohibiting an adult theater within a thousand feet of a church?

Answer: I would say a church – reasons of peace and quiet of the church activities, separation of the religious activities from other activities that could have a conflict.

Question: What kind of conflict?

Answer: Moral conflict.

Question: What are those two philosophies that might come in conflict?

Answer: Pro-adult business and adverse to an adult business.

Question: But what has that got to do with the church? I'm missing it. I'm sorry.

Answer: Churches are usually – are opposed to adult businesses because of the moral aspect.

Question: When you say 'moral aspect,' what moral aspect?

Answer: Perhaps I don't know quite how to answer that.

Question: Well, you're doing okay. Just give me your best answer.

Answer: Well, most churches are against the display of the human body or for anyone that wants to view the human body in acts. And of course, the other side of the fence is that those that feel it's all right, or wish to – particularly wish to view, or the act or an act.

Question: Is it fair to say, then, that the reason, the justification for having a separation of a thousand feet between an adult theater and a church is to protect the sensitivites of the religious people who attend the churches?

Answer: I think both sides.

Question: Pardon?

Answer: In fact, both sides.

Question: When you say 'both sides,' first answer my question. The answer to my question is 'yes', is that correct?

Mr. Porter's deposition statements were to the effect that allowing church uses near adult business uses would lead to a situation where "[t]here could be incompatibility. Close proximity could cause conflict between the two philosophies, the uses." RT at 91, lines 13-15. In so stating, Mr. Porter was merely echoing the statement by this Court that:

> "Plainly schools and churches have a valid interest in being insulated by certain kinds of commercial establishments, including those dispensing liquor. Zoning laws have long been employed to this end, and *there could be little doubt about the power of a state to regulate the environment in the vicinity of* schools, *churches,* hospitals, and the like by exercise of reasonable zoning laws." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121 (1982) (emphasis added).

Answer: Yes.

Question: Now, when you say 'both sides,' what do you mean?

Answer: I would say those that frequent the adult business may have certain sensitivies [sic] with the close proximity of a church.

Question: And what do you base that on?

Answer: Just experience.

Question: What experience?

Answer: About 27 years of planning experience.

Question: And in that sense, you found people who attend adult theaters are offended if there is one within a thousand feet of a church. Is that what you are telling me?

Answer: Quite possible, yes.

Question: Anything is possible. Do you think it's probable?

Answer: Yes, I do." Reporter's Transcript ("RT") at 90-93.

Porter's cited statement as to the justification for the separation between adult businesses and churches, far from being evidence of an improper motive, is merely a restatement of a principle subscribed to by eight members of this Court in *Grendel's Den*. It is a statement of fact, and not an indication of a motive to suppress protected speech on the part of any councilmember of Whittier.

B. Despite This Court's Decision In *Young*, The Ninth Circuit Has Refused To Recognize That Adult Business Regulations Are Adopted To Serve Legitimate Interests.

The Ninth Circuit in this case held that the City offered "no evidence" that it had an important or substantial governmental interest in regulating the location of adult businesses. App. 6a. The requirement of evidence of an important or substantial government interest, which has been developed from Justice Powell's concurring opinion in *Young*, is unnecessary, but in any event was amply satisfied in this case.

In *Young*, four Justices of this Court found sufficient reason to enact the ordinance in question based upon findings of the Detroit Common Council, a police department memorandum, and "the opinion of urban planners and real estate experts who supported the ordinances." 427 U.S. at 54-55. Similar evidence exists in this case, and *Amici* submit that this is sufficient justification for the regulations.

The concurring opinion of Justice Powell did not disagree with the plurality on the question of justification. The concurrence stated "it is clear beyond question that the Detroit Common Council had broad regulatory power to deal with the problem that prompted

enactment of the Anti-Skid Row Ordinance." *Id.* at 74. Justice Powell further stated:

> "Nor is there doubt that the interests furthered by this ordinance are both important and substantial. Without stable neighborhoods, both residential and commercial, large sections of a modern city quickly can deteriorate into an urban jungle with tragic consequences to social, environmental and economic values. While I agree with respondents that no aspect of the police power enjoys immunity from searching constitutional scrutiny, it also is undeniable that zoning, when used to preserve the character of specific areas of a city, is perhaps 'the most central function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.' " *Id.* at 80 (citation omitted).

The Court's decision in *Young*, coupled with the large number of studies of secondary effects of adult businesses which have been conducted by cities in the United States, suggest that the secondary effects associated with the establishment of adult businesses within a city are a matter which should be judicially noticed. In the absence of evidence to the contrary, courts should assume that cities have a legitimate governmental interest in adopting ordinances regulating the location of adult businesses. This Court should not require repetitive investigations in communities sharing similar problems. *County of Sacramento v. Superior Court*, 137 Cal.App.3d 448, 455, 187 Cal.Rptr. 154, 158-59 (1982).

As this case demonstrates, the Ninth Circuit has coupled its requirement of a full independent and

repetitive investigation with a policy to reject any reasonable attempts to perform such a study. Whittier performed a seven month study which documented the significant secondary effects that existed within the City, which included massive increases in crime; harassment of citizens, including children; and a decrease in property values coupled with a negative impact on Whittier's efforts to improve the economic base of the City through redevelopment. App. 119a. The Ninth Circuit appears to have held that Whittier was required to justify its governmental interest by reference to Walnut's Theatre alone. This is contrary to long-held precedent of this Court, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926), and grants Walnut with more protection than provided to general release theaters.

Furthermore, the plurality in *Young* indicated that the type of speech regulated by Detroit's ordinance is entitled to less protection than other forms of speech. 427 U.S. at 65-69 (citing to *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). Since the decision in *Young*, this Court has held that the governmental interest in the "well-being of its youth" justifies special treatment of indecent but non-obscene radio broadcasts received by adults as well as children (*FCC v. Pacifica Foundation*, 438 U.S. 726 (1978)) and, in reviewing a statute outlawing distribution of material depicting sexual performances by children under the age of sixteen, this Court stated that it would not "second-guess" the legislature's findings (*New York v. Ferber*, 458 U.S. 747, 757-58 (1982)). In that Whittier's regulations are designed, in part, to protect children from exposure to material of a frank sexual nature (*see* App. 126a-27a), and since the speech of adult businesses such as Walnut is low "in the

heirarchy of First Amendment values" (*FCC v. Pacifica Foundation*, 438 U.S. at 746), this Court should reverse the Ninth Circuit and find Whittier's regulations adequately justified.

C. The Ninth Circuit Has Required That Cities Provide Adult Businesses With More Than Equal Protection By Invalidating Regulations On The Assumption That Landlords Are Unwilling To Rent To Such Businesses And By Requiring Every Portion Of A City To Be Open To Such Businesses.

The Ninth Circuit found that Whittier's regulations do not by themselves ban adult theaters from the City, but that the reluctance of a shopping center owner to lease to such a theater combined with the unlikelihood of an appropriate vacancy "will probably have the same effect." App. 7a. The Ninth Circuit made this conclusion without any evidence on the record to support the assumption that a shopping center owner would be less likely to lease to an adult theater than any other type of theater.

Whittier cannot be held respnsible for market conditions which are beyond its control. There is no argument but that ordinances such as the type approved by this Court in *Young* may result in economic hardship.

> "Nortown [an adult theater] concededly will not be able to exhibit adult movies at its present location, and the ordinance limits the potential location of the proposed Pussy Cat [another adult theater]. The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic

> detriment as a result of land-use regulation. *The cases are legion that sustained zoning against claims of serious economic damage. See, e.g., Zahn v. Board of Public Works*, 274 U.S. 325, 71 L.Ed 1074, 47 S.Ct. 594 (1927)." *Young*, 427 U.S. at 78 (Powell, J., concurring) (emphasis added).

In addition, the Ninth Circuit found Whittier's regulations unconstitutional because they made it "impossible to operate [an adult business] in the central business district." App. 7a. In so ruling, the Ninth Circuit apparently held that there is a constitutional requirement that an adult business be permitted to locate in any district of the City which it desires. As five members of this Court stated in *Young* on this point:

> "First Amendment rights are indirectly related, but only in the sense that they cannot be freely exercised in specific locations. Plaintiffs would not contend that they are entitled to operate a theatre or bookstore, which are commercial businesses, in a residentially zoned area; nor could they claim the right to put on a performance for profit in a public street." 427 U.S. at 57 n.13 (quoting from *Nortown Theatre v. Gribbs*, 373 F.Supp. 363, 371 (E.D. Mich. 1974)).

Similarly, Walnut does not have an absolute right to operate in the City's central business area, in which a large number of other uses, including First Amendment uses such as theaters, live entertainment and churches, may not operate as a matter of right. Such a rule would grant adult businesses more than "equal protection."

CONCLUSION

Based upon the foregoing, this Court should undertake a full review of all of the facts and issues involved in the matter of the validity of Whittier's adult business zoning regulations, not only for the purpose of correcting the errors made by the lower federal courts in this litigation but to instruct these courts on the need for respect of the decisions made through state judicial processes, and to restate its decision in *Young* on the latitude available to cities in their attempt to "experiment with solutions to admittedly serious problems." 427 U.S. at 71.

Respectfully submitted,

CHARLES R. REVLETT
City Attorney
City of Oceanside, California
Attorney for Amici Curiae

APPENDIX

APPENDIX A

All California Cities Joining In This Brief

Alameda

Carter Stroud
City Hall, Santa Clara
Avenue and Oak Street
Alameda, California 94501

Alhambra

Leland C. Dolley
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Anaheim

Jack L. White
200 South Anaheim Boulevard
Anaheim, California 92805

Arcadia

Michael H. Miller
240 West Huntington Drive
Arcadia, California 91006

Azusa

Peter M. Thorson
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Bakersfield

Richard J. Oberholzer
1501 Truxtun Avenue
Bakersfield, California 93301

Bellflower

Maurice O'Shea
9838 East Belmont Street
Bellflower, California 90706

Burbank

Douglas C. Holland
275 East Olive Avenue
Burbank, California 91502

Camarillo

Colin Lennard
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Cathedral City

Raymond E. Ott
68-625 Perez Road
Cathedral City, California
92234

Coachella

David J. Erwin
74-090 El Paseo
Box 789
Palm Desert, California 92261

Commerce

William Camil
2460 Huntington Drive
San Marino, California 91108

Concord

Kenneth C. Scheidig
1950 Parkside Avenue
Concord, California 94519

Corona

Dallas Holmes
Best, Best & Krieger
4200 Orange Street
Riverside, California 92501

Culver City

Bert Glennon, Jr.
9770 Culver Boulevard
Culver City, California 90230

Downey

Carl K. Newton
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Duarte

William Camil
2460 Huntington Drive
San Marino, California 91108

El Monte

Sidney Maleck
11333 Valley Boulevard
El Monte, California 91734

El Segundo

Leland C. Dolley
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Escondido

David R. Chapman
100 Valley Boulevard
Escondido, California 92025

Fairfax

Leland Jordan
26 Corte Madera Avenue
Mill Valley, California 94941

Fremont

Allen E. Sprague
39700 Civic Center Drive
Fremont, California 94538

Fresno

James A. McKelvey
City Hall
2326 Fresno Street
Fresno, California 93721

Glendale

Frank R. Manzano
613 East Broadway
Glendale, California 91206

Hawaiian Gardens

Maurice O'Shea
9838 East Belmont Street
Bellflower, California 90706

Huntington Park

Elwayne E. Smith
6550 Miles Avenue
Huntington Park, California
90255

Indio

David J. Erwin
74-090 El Paseo
Box 789
Palm Desert, California 92261

Irwindale

Charles Martin
5050 North Irwindale Avenue
Irwindale, California 91706

Lemon Grove

Donald F. McLean
3232 Main Street
Lemon Grove, California
92045

Lodi

Ronald M. Stein
221 West Pine Street
Lodi, California 95240

Lomita

Leland C. Dolley
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Long Beach

John R. Calhoun
333 Ocean Boulevard,
Room 1100
Long Beach, California 90802

Los Altos

Robert K. Booth, Jr.
P. O. Box 152
Los Altos, California 94401

Los Angeles

Kenneth Hahn, City Attorney
Claude Hilker,
Chief Assistant
City Attorney
Claudia McGee Henry,
Assistant City Attorney
200 North Main Street,
17th Floor
Los Angeles, California 90012

Manhattan Beach

Carl K. Newton
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Merced

Steven F. Nord
1730 M Street
Merced, California 95340

Mill Valley

Leland Jordan
26 Corte Madera Avenue
Mill Valley, California 94941

Monterey

William Marsh
651 Pacific Street
Monterey, California 93940

Napa

Betsy Strauss
955 School Street
Napa, California 94559

Newport Beach

Robert Burnham
3300 Newport Boulevard
Newport Beach, California
92663

Novato

Natalie E. West
901 Sherman Avenue
Novato, California 94947

Oxnard

K. Duane Lyders
300 West Third Street
Oxnard, California 93030

Palm Desert

David J. Erwin
74-090 El Paseo
Box 789
Palm Desert, California
92261

Palm Springs

William J. Adams
3200 Tahquitz-McCallum
Way
Palm Springs, California
92262

Paramount

Maurice O'Shea
9838 East Belmont Street
Bellflower, California 90706

Pleasant Hill

Dennis Lee
3300 North Main Street
Pleasant Hill, California 94525

Pomona

Patrick J. Sampson
505 South Garey Avenue
Pomona, California 91769

Rancho Mirage

Jean Harris
69-825 Highway 111
City Hall
Rancho Mirage, California 92270

Redding

Randall A. Hays
760 Parkview Avenue
Redding, California 96001

Redlands

Dallas Holmes
Best, Best & Krieger
4200 Orange Street
Riverside, California 92501

Rialto

Robert Koch
150 South Palm Avenue
Rialto, California 92376

Riverside

John Woodhead
3900 Main Street
Riverside, California 92522

Sacramento

James P. Jackson
812 Tenth Street,
Suite 201
Sacramento, California 95814

Salinas

David M. Kennedy
200 Lincoln Avenue
Salinas, California 93901

San Bernardino

Ralph H. Prince
300 North D Street
San Bernardino,
California 92418

San Diego

John W. Witt
202 C Street, 3rd Floor
San Diego, California 92101

San Francisco

George Agnost,
City Attorney
Burk E. Delventhal,
Deputy City Attorney
City Hall, Room 206
San Francisco, California 94102

Santa Clara

Edwin J. Moore
1500 Warburton Avenue
Santa Clara, California 95050

Santa Fe Springs

William Camil
2460 Huntington Drive
San Marino, California 91108

Santa Maria

Arther R. Montandon
110 East Cook Street
Santa Maria, California 93454

Santee

Gloria F. McLean
10765 Woodside Avenue
Santee, California 92071

Sausalito

Leland Jordan
26 Corte Madera Avenue
Mill Valley, California 94941

Sierra Madre

Charles Martin
5050 North Irwindale Avenue
Irwindale, California 91706

South Lake Tahoe

J. Dennis Crabb
1900 Lake Tahoe Boulevard
South Lake Tahoe,
California 95705

Stockton

Gerald A. Sperry
City Hall
Stockton, California 95202

Temple City

Charles Martin
5050 North Irwindale Avenue
Irwindale, California 91706

Torrance

Stanley E. Remelmeyer
3031 Torrance Boulevard
Torrance, California 90503

Tustin

James G. Rourke
300 Centennial Way
Tustin, California 92680

Vacaville

Linnie Kramer
650 Merchant Street
Vacaville, California 95688

West Covina

Colin Lennard
Burke, Williams & Sorensen
624 South Grand Avenue,
11th Floor
Los Angeles, California 90017

Belvedere

Gary T. Ragghianti
874 Fourth Street
San Rafael, California 94901

San Rafael

Gary T. Ragghianti
874 Fourth Street
San Rafael, California 94901

Santa Barbara

Steven A. Amerikaner
City Hall
De La Guerra Plaza
P.O. Drawer P - P
Santa Barbara, California 93102

Town of Tiburon

Robert I. Conn
874 Fourth Street
San Rafael, California 94901

APPENDIX B

May 28, 1985

Honorable Phillip B. Winberry
Clerk of the Court
United States Court of Appeal
Ninth Judicial Circuit
7th and Mission Streets
San Francisco, CA 94103

Re: *Walnut Properties, Inc. v. City of Whittier*
Nos. 84-5755 and 84-6087

Dear Mr. Winberry:

The undersigned, on behalf of the Defendants-Appellants (hereafter "City") in the above-entitled action, hereby requests, pursuant to Rule 21(d) of the Rules of the United States Court of Appeal for the Ninth Circuit, that the unpublished disposition of the above-entitled case by Memorandum filed May 14, 1985 (hereafter "Memorandum") be published in the Federal Reporter. The City contends that the Memorandum meets several of the criteria set forth in Rule 21(b), and that therefore the Memorandum must be published.

Under Rule 21(b), Opinions are to be published if *any* of the six criteria are met. Because there is no separate or concurring opinion, Rule 21(b)(6) does not apply. However, the other five criteria set forth in Rule 21(b) apply, as follows:

The Memorandum Establishes, Alters, Modifies Rules of Law (Rule 21(b)(1)) and Criticizes Existing Law (Rule (21b)(3)).

The Memorandum establishes an important rule of law in the Ninth Circuit. Prior appellate authority provided that zoning ordinances regulating first amendment activities are unconstitutional if "a

motivating reason" for its adoption was "to suppress protected expression." (*Tovar v. Billmeyer* (9th Cir. 1983) 721 F.2d 1260, *cert denied* 105 S.Ct. 223.) According to the Memorandum, where such a motivating factor exists, the defect can *never* be remedied (Memorandum, pp.9-10). Thus, the Memorandum establishes a new legal rule: once a court has found a municipal zoning ordinance regulating a First Amendment activity unconstitutional, the municipality must forever abandon any attempt to regulate that activity.

The Memorandum also establishes a new legal proposition: impermissible motive exists where statements of a staff member of the City are made subsequent to the ordinance's enactment expressing the *staff member's opinion* but not that of a legislator.

Finally, the Memorandum criticizes existing law and alters and modifies it on the subject of the calculation of attorneys' fees. The Memorandum states that:

> "This court has declined to endorse the 'lodestar approach' used in other circuits under which, absence special circumstances, the starting figure for an hourly rate should be 'counsel's normal billing rate.' *Moore*, 682 F.2d at 840. Instead it adheres to a list of 12 factors for determining the fee award as a whole" (Memorandum, p. 10, lines 8-22 (citations omitted).)

However, the Court in *Moore v. James J. H. Matthews & Co.* (9th Cir. 1982) 682 F.2d 830, adopted the "blended" approach to the calculation of attorneys' fees. This approach employs *both* the "lodestar approach" and the 12 *Kerr* factors.

In *Moore*, the Court stated:

> "We note with approval the district courts in this circuit have increasingly responded to perceived flaws in the *Kerr* and lodestar approaches by blending the best features of the two approaches. [Citations.] This court recently upheld a fee award calculated with a blend of lodestar and *Kerr* analysis.
>
> ***
>
> "We believe that the blended approach is well suited . . . for use in calculating the fee award on remand." (*Id.* at 840-41.)

Moreover, the Memorandum alters and modifies the rule for awarding attorneys' fees set out by this Circuit in *Sealy, Inc. v. Easy Living, Inc.* (9th Cir. 1984) 743 F.2d 1378. As in the instant case, the *Sealy* court stated that the "[a]ward of attorneys' fees is in the discretion of the district court, and we will not disturb an award unless the district court has abused its discretion." (*Id.* at 1384.) However, the decision of the *Sealy* court differs from the decision in the instant case regarding the burden of producing evidence and the necessity for an adequate record.

In *Sealy*, as in this case, the Court was presented with Findings which the District Court had ordered prepared by the prevailing party (i.e., by the "winning lawyers", *Sealy*, p. 1385, n.3). The Court in *Sealy*, found that this "regretable practice" required that the Findings be reviewed with "special scrutiny." (*Id.* at 1385, n.3.) In the instant case, the Memorandum does not give *any* "special scrutiny" to the Findings. In fact the Memorandum states that it is the City's burden to rebut those Findings. This is contrary to the rule in *Sealy* that the record must present "adequate review of the factors upon which the district court based its decision." (*Id.*) The

Sealy court held that where the trial court uncritically accepts representations concerning the time expended on the case and then awards the entire amount requested, this is inappropriate. (*Id.*) However, this is the exact procedure which was adopted by the trial court in the instant case, and approved by the Memorandum. Therefore, the Memorandum alters or modifies existing law.

The Memorandum Calls Attention to a Generally Overlooked Rule of Law (Rule 21(b)(2)).

On the issue of res judicata, the Court relies upon the decision of the United States Supreme Court in *Aurora City v. West* (1868) 74 U.S. (7 Wall.) 82. There can be no question but that reliance upon a case decided 117 years ago calls attention to a "generally overlooked" rule of law.

The Case Involves Issues of "Unique Interest" and "Substantial Public Importance" (Rule 21(b)(4)).

This case involves the basic question of: To what extent may a public entity regulate a "First Amendment activity?" There are 436 cities and 58 counties in California, most of which have in place adult business zoning regulations either requiring dispersal, as in the instant case, or requiring a concentration of adult businesses. The constitutionality of all of these ordinances is affected by the disposition of this case.

That this matter is of considerable importance cannot be denied, especially in view of the fact that the United States Supreme Court has noted probable jurisdiction in *City of Renton v. Playtime Theaters* (No. 84-1360, opinion below, 748 F.2d 527 (9th Cir. 1984)). That case involves many facts and circumstances identical to the instant case. Prior to the issuance of the Memorandum, the City, by letter, had requested that the panel defer

resolution of this case pending action by the United States Supreme Court in the *Renton* case; that request was refused.

Finally, the Court's determination has the effect of invalidating a "state" enactment, which is in itself of substantial public importance within the meaning of Rule 21(b)(4).

The Court Decided a Case in Which There is Another Published Opinion (Rule 21(b)(5)).

Rule 21(b)(5) provides for publication where there is "a published opinion by a lower court or adminstrative agency . . ." This provision is seemingly broad enough to cover the situation in the instant case, where although there is no published opinion by the Federal District Court, a published opinion exists of a California court.

The constitutionality of the City's adult business zoning ordinances was also the subject of a published opinion of the California Court of Appeal (*City of Whittier v. Walnut Properties, Inc.* (1983) 149 Cal.App.3d 637). That opinion found the ordinances constitutional. Without publication of the Memorandum, the validity of this ordinance and other similar ordinances will remain unclear and thus in doubt.

Rule 21(b) provides that dispositions "shall" be published if any one of the criteria set forth in the Rule are met. In this case, five of six of the criteria of the Rule are met. Therefore, the City respectfully requests that the final disposition in this matter be redesignated and published as an Opinion.

Very truly yours,

J. ROBERT FLANDRICK
of BURKE, WILLIAMS & SORENSEN

cc:

Thomas G. Mauk, City Manager
Stanley Fleishman, Esq.
Honorable Arleigh M. Woods
Honorable Robert Kingsley
Honorable Eugene McClosky

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 18 1985

CLERK, U.S. COURT OF APPEALS

WALNUT PROPERTIES, INC., a California Corporation, and VINCENT MIRANDA, an individual, Plaintiffs-Appellees, v. CITY OF WHITTIER, a Charter City; M.D. KLAXTON, R.L. HENDERSON, L.A. STRONG, GENE CHANDLER, V.A. LOPEZ, as Members of the Whittier City Council; JAMES BALE, as Chief of Police of the City of Whittier; and JOHN ROBERT FLANDRICK, as City Attorney of the City of Whittier, Defendants-Appellants.	)	Nos. 84-5755, 84-6087 D.C. No. CV 81-2262-R **ORDER**

On appeal from the United States District Court
for the Central District of California
Hon. Manuel L. Real, District Judge, presiding

Before: BOOCHEVER and BEEZER, Circuit Judges and SOLOMON,* District Judge.

Appellant's request for publication is denied.

* Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 28, 1986, I served the within *Brief of Amici Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

The Honorable John K.
Van de Kamp
Attorney General
555 Capitol Mall
Suite 350
Sacramento, California 95814

Burke, Williams & Sorensen
J. Robert Flandrick,
City Attorney,
City of Whittier
Katherine E. Stone
Benjamin S. Kaufman
Lisa E. Kranitz
624 South Grand Avenue
11th Floor
Los Angeles, California 90017

Stanley Fleishman, Esq.
2049 Century Park East
Suite 3160
Los Angeles, California 90067

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 28, 1986, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)